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## Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action

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## Article

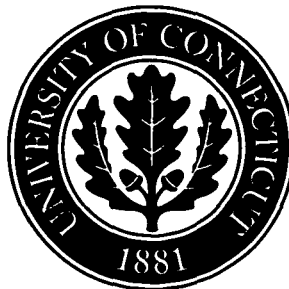
### Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?

MICHAEL Z. GREEN

*In these tough economic times, employers have responded by pursuing four-day work weeks and other mechanisms that change the components of the standard five-day work week. Although four-day work weeks provide some savings in the form of reduced operating and energy costs and have received recent notice for also being family-friendly and environmentally friendly, current dismal economic prospects have inspired employers to pursue other work week changes to achieve further savings. Furloughs, also referred to as unpaid days off, represent a form of a reduced work week as employees do not work during their furloughed time and receive no income for those hours. Furloughs have become more prevalent as employers have offered this option to employees as a major cost-cutting action and as a unique response to the current recession. In some situations, employers have mandated these furloughs without consulting employees. In other situations, furloughs have been presented as a sympathetic action by an employer seeking to help employees by not pursuing layoffs. In the midst of a nearly unprecedented jobs crisis, employees have few options when responding to these wage-cutting initiatives. This Article offers a strategy to assist employees in developing a comprehensive response to an employer's planned furloughs. Through collective action, employees and their unions can navigate these difficult economic times and focus on the one benefit that would significantly aid financially-distressed workers: paid leave. Either through legislative action or union-negotiated agreements, employees must band together and respond collectively to furlough initiatives by exploring all other cost-cutting measures and by seizing upon this time to seek paid leave benefits.*

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# Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?

MICHAEL Z. GREEN\*

*For as much as government can do and must do, it is ultimately the faith and determination of the American people upon which this nation relies. It is the . . . selflessness of workers who would rather cut their hours than see a friend lose their job which sees us through our darkest hours.<sup>1</sup>*

## I. INTRODUCTION: WORKING FOR LESS PAY IN TOUGH ECONOMIC TIMES THROUGH FOUR-DAY WORK WEEK FURLOUGH INITIATIVES

The words from President Obama quoted above suggest the power of collective employee action in tough economic times. With double digit unemployment rates not seen in the United States for more than twenty-five years,<sup>2</sup> many employees may now have to respond to an employer's offer to "work less—and thus earn less—for the good of the organization in lean times."<sup>3</sup> American workers are overworked<sup>4</sup> and need more time

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\* Professor of Law and Associate Dean for Faculty Research & Development, Texas Wesleyan University School of Law. I would like to thank the *Connecticut Law Review* Symposium Editors John Langmaid and Patrick Murphy for inviting me to participate in the Symposium, *Redefining Work: Implications of the Four-Day Work Week*, held at the University of Connecticut School of Law on October 30, 2009. At that time, I presented the paper that became this Article. I praise the *Connecticut Law Review* Editors who worked hard and suggested thoughtful changes that added immeasurable improvements to this Article. I would also like to thank Ellen Dannin and Kenneth Dau-Schmidt for their comments and suggestions offered when I presented an earlier version of this Article at the Fourth Annual Labor and Employment Scholarship Colloquium at Seton Hall School of Law on September 25, 2009. I appreciate the comments I received about an earlier version of this Article from colleagues Susan Ayres and Huyen Pham, the financial support provided by the Texas Wesleyan University School of Law, and the student research assistance from Rachel Hale, Jillian Munoz, Jessica Sennett, Anne Sontag, and Keri Ward. I am eternally grateful for the encouragement and support of Margaret Green.

<sup>1</sup> Barack Obama, President of the United States of America, Inaugural Address, *We Seek a New Way Forward* (Jan. 20, 2009), in CHI. TRIB., Jan. 20, 2009, at 2. Shortly after this speech, in February 2009, a classic example of this selflessness occurred when several workers in the Kern County California Roads Department volunteered to take periodic time off without pay to prevent the layoff of one person in the department, which had become necessary due to economic problems. See *Voluntary Furloughs Save Colleague's Job*, KGET, Feb. 24, 2009, [http://www.kget.com/news/local/story/Voluntary-furloughs-save-colleagues-job/\\_IEcpPu52UeDmyOZWSDuWw.cspx](http://www.kget.com/news/local/story/Voluntary-furloughs-save-colleagues-job/_IEcpPu52UeDmyOZWSDuWw.cspx).

<sup>2</sup> See Peter S. Goodman, *U.S. Unemployment Rate Hits 10.2%, Highest in 26 Years*, N.Y. TIMES, Nov. 7, 2009, <http://www.nytimes.com/2009/11/07/business/economy/07jobs.html>; Posting of Kelly Evans to Real Time Economics, <http://blogs.wsj.com/economics/2009/11/06/unemployment-extension-adds-up-to-99-weeks-of-benefits/> (Nov. 6, 2009, 12:37 EST).

<sup>3</sup> Cari Tuna & Dana Mattioli, *The Politics of Volunteering for a Furlough*, WALL ST. J., Mar. 12, 2009, at D1.

for their families.<sup>5</sup> Thus, an employee might embrace this offer by valuing the time off from work more than the loss in pay. On the other hand, an employee, especially a low-wage earner, might reject such an offer because the employee could not afford to take any pay cut, regardless of the employer's financial difficulties.<sup>6</sup>

As the saying goes, "desperate times call for desperate measures,"<sup>7</sup> and the current levels of unemployment suggest that we have reached desperate times in terms of workers trying to keep their jobs and those seeking jobs.<sup>8</sup> One measured response by employers to help cut costs during these tough economic times has been to reduce the standard work week to four working days.<sup>9</sup> For example, Utah became the first state to mandate a four-day work week, where state employees work ten hours per day, four days per week in order to provide cost savings through reduced operating and energy costs.<sup>10</sup> Those efforts to reduce the work week to four days

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<sup>4</sup> See Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 53 (2005); Posting of Johann Hari to The Huffington Post, [http://www.huffingtonpost.com/johann-hari/there-is-an-alternative-t\\_b\\_415525.html](http://www.huffingtonpost.com/johann-hari/there-is-an-alternative-t_b_415525.html) (Jan. 7, 2010, 19:07 EST). Several authors have highlighted the difficulties that American workers face in being overworked. See, e.g., JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE* 13–14, 60 (2004) (describing the lack of family time associated with overwork); JULIET B. SCHOR, *THE OVERWORKED AMERICAN* 31 (1991) (noting that many Americans juggle more than one job).

<sup>5</sup> See, e.g., Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131, 137 (Judy Fudge & Rosemary Owen eds., 2006) (referring to studies showing that most men and women, regardless of marital or parental status, would prefer to work less and devote more time to family and personal care); Michelle Goodman, *Furloughs: The Vacation You Never Wanted*, ABC NEWS, Apr. 9, 2009, <http://abcnews.go.com/business/economy/story?id=7291391> (reporting a 2008 survey in which forty-two percent of working dads and thirty-four percent of working moms would take a reduction in pay of ten percent or more in order to spend more time with their children). But see Susan Saulny & Robbie Brown, *On a Furlough, But Never Leaving the Cubicle*, N.Y. TIMES, June 15, 2009, at A1 (describing the experience of several employees who embraced the idea of a day off to pursue personal and family activities but found they were being pressured to work even on those days in which they were not being paid).

<sup>6</sup> See Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7, 12 (2006); see also Megan Barnett & Jeff Bercovici, *Furlough Envy*, PORTFOLIO, Mar. 27, 2009, <http://www.portfolio.com/business-news/portfolio/2009/03/27/Furlough-Envy/> (describing comments of economics professor Deborah Figart on how those employees at the lowest end of the wage and job scale are living from "paycheck to paycheck" and how they would view an unpaid furlough as "regressive in nature" and "life-altering," even for only "a 5 percent pay cut").

<sup>7</sup> Mary Garvey Algero, *Will a Decision that Has the Potential To Do So Much Good for the People of Louisiana Set a Harmful Precedent?*, 53 LOY. L. REV. 47, 47 (2007).

<sup>8</sup> See Paul Krugman, *Bernanke's Unfinished Mission*, N.Y. TIMES, Dec. 11, 2009, at A34.

<sup>9</sup> Bryan Walsh, *Thank God It's Thursday*, TIME, Sept. 7, 2009, at 58. See also Posting of Aaron Newton to The Oil Drum, <http://www.theoil Drum.com/node/2996> (Sept. 20, 2007, 10:00 EST) (suggesting sixteen reasons why a four-day work week is viable).

<sup>10</sup> Cathy Mckittrick, *Herbert May Keep Four-Day Workweek*, SALT LAKE TRIB., Aug. 6, 2009, [http://www.sltrib.com/ci\\_13000623](http://www.sltrib.com/ci_13000623). Utah is probably the most prominent example of how the four-day work week has created savings, and its success has spurred managers from around the world to contact Utah officials to learn from and follow their experience. Walsh, *supra* note 9; Editorial, *Wellington's Short Work Week Works*, PALM BEACH POST, Oct. 8, 2009, [http://www.palmbeachpost.com/opinion/content/opinion/epaper/2009/10/08/a14a\\_4dayweek\\_edit\\_1009.html](http://www.palmbeachpost.com/opinion/content/opinion/epaper/2009/10/08/a14a_4dayweek_edit_1009.html); Hari, *supra* note 4.

without reducing employees' wages suggest a good balance of employees' concerns about having more time for personal pursuits, employers' concerns about cutting costs, and overall concerns about the environment.<sup>11</sup>

Unfortunately, we now operate in the midst of a major jobs crisis<sup>12</sup> where the motivation to work less, to allow employees more leisure, or to prevent them from being overworked does not resonate with workers who are just struggling to keep their jobs.<sup>13</sup> Accordingly, many employer efforts to reduce the work week to four days over the last year have also focused on reducing wages in accordance with the decrease in working hours.<sup>14</sup> These reduced work week<sup>15</sup> or furlough<sup>16</sup> initiatives represent

<sup>11</sup> See Hari, *supra* note 4.

<sup>12</sup> See Peter Coy et al., *The Disposable Worker*, BUS. WEEK, Jan. 7, 2010, [http://www.businessweek.com/print/magazine/content/10\\_03/b4163032935448.htm](http://www.businessweek.com/print/magazine/content/10_03/b4163032935448.htm) ("[A]merican workers are in bad shape when a low-paying, no-benefits job is considered a sweet deal."); ECON. POLICY INST., AMERICAN JOBS PLAN, A FIVE-POINT PLAN TO STEM THE U.S. JOBS CRISIS 3 (Dec. 2009), available at [http://epi.3cdn.net/c68c0d218e2750adb3\\_rwm6iz75b.pdf](http://epi.3cdn.net/c68c0d218e2750adb3_rwm6iz75b.pdf) (describing the jobs crisis as the worst since the Great Depression with nearly sixteen million Americans out of work, one out of three of those unemployed have been without work for more than six months or more, and another 9.3 million Americans who are now only working part-time because they cannot find full-time work).

<sup>13</sup> See Editorial, *County Unions Sell Out Their Own*, SACRAMENTO BEE, Oct. 23, 2009, at 16A (asserting that refusals to accept furloughs and wage reductions leads to employees with seniority protecting their jobs, while employees with little seniority lose their jobs and join the ranks of the unemployed); Jonathan Hyman, *Furloughs and Unpaid Time Off Create Wage-and-Hour Problems*, BUS. MGMT. DAILY, May 4, 2009, <http://www.businessmanagementdaily.com/articles/18515/1/Furloughs-and-unpaid-time-off-create-wage-and-hour-problems/Page1.html#> (explaining that once the recession hit, family-friendly practices "have suddenly taken a back seat as struggling businesses focus on the bottom line"); Jon Ortiz, *Uncertainty Won't End at Hearing Today*, SACRAMENTO BEE, Jan. 29, 2009, at A3 (describing how California public workers, who challenged efforts by Governor Arnold Schwarzenegger to make them take furloughs, were starting to change their minds and would accept the lower pay because they recognized that they could lose their jobs instead).

<sup>14</sup> See, e.g., John Darling, *SOU Will Likely Face Furlough Days, Some Four-Day Weeks*, ASHLAND DAILY TIDINGS, June 16, 2009, <http://www.dailytidings.com/apps/pbcs.dll/article?AID=/20090616/NEWS01/90616002>; Laura Petrecca, *More Companies Turn to Furloughs To Save Money, Jobs*, USA TODAY, Mar. 5, 2009, at 1B; Dan Richman, *The Money Squeeze: Employees Get a Break But They Don't Get Paid*, SEATTLE POST INTELLIGENCER, Jan. 14, 2009, at A1; Russell Wild, *Furloughed: Suddenly Millions of Workers Have Time Off*, AARP BULL. TODAY, Apr. 8, 2009, available at [http://bulletin.aarp.org/yourmoney/work/articles/furloughed\\_suddenly\\_millions\\_of\\_workers\\_have\\_time\\_off\\_.html](http://bulletin.aarp.org/yourmoney/work/articles/furloughed_suddenly_millions_of_workers_have_time_off_.html). Even the State of Utah has addressed recent economic problems by applying furloughs that essentially turn their four-day work week effort into a three-day work week. See Patty Henetz, *State Workers Get Bad News at Party: Furloughs Loom*, SALT LAKE TRIB., Dec. 21, 2009, [http://www.sltrib.com/news/ci\\_14044157](http://www.sltrib.com/news/ci_14044157).

<sup>15</sup> Reduced work week "refers to a schedule of a full-time career employee which is modified on a regular fixed basis to less than forty (40) hours per week." City of Sacramento, Voluntary Work Furlough/Reduced Workweek Program, [http://www.cityofsacramento.org/labor-relations/Documents/PDFs/policies\\_and\\_procedures/Furlough.pdf](http://www.cityofsacramento.org/labor-relations/Documents/PDFs/policies_and_procedures/Furlough.pdf) (last visited Apr. 9, 2010).

<sup>16</sup> Work furlough "refers to a full day of unpaid leave on a variable schedule." *Id.* See also Susan M. Heathfield, *Employee Furloughs*, <http://humanresources.about.com/od/glossary/g/furlough.htm> (last visited Apr. 21, 2010) ("Employee furloughs are mandatory time off work with no pay. Used as an alternative to a layoff, employee furloughs can occur in both public and private sector organizations when revenue or projected revenue fails to match expenses."). Today, the term "furlough" has come to mean "mandatory unpaid leave," which differs from the original use of the word in the military context, which involved being paid. Dean Dad, *Furloughs*, INSIDE HIGHER ED., Feb. 1, 2009, [http://www.insidehighered.com/blogs/confessions\\_of\\_a\\_community\\_college\\_dean/furloughs](http://www.insidehighered.com/blogs/confessions_of_a_community_college_dean/furloughs). Throughout this Article, the term "furlough" is assumed to mean unpaid time off from work

wage reductions that are being offered to employees as friendly acts by employers in the current recession.<sup>17</sup> Whether these initiatives are voluntary or mandatory, employees in both the public and private sectors must face the prospect of a four-day work week with reduced income.

The assessment of whether reduced work week initiatives provide a good policy option to address employment issues has become entangled with certain questions regarding the purpose and the method of implementing these initiatives.<sup>18</sup> Will employees' income be reduced proportionally to provide financial benefits to employers for each hour an employee works less pursuant to these initiatives, and, if so, how long will the salary reductions last? Will employers decide unilaterally to implement these initiatives, or will employees and their unions be allowed to participate in creative processes to decide if and how to implement them? Will employers and employees, along with their unions, openly use these initiatives as a tool to reduce the burdens of overworked employees and provide a more family-friendly workplace?

In considering these questions, this Article examines the impact of employer-led efforts to reduce the work week and employee pay based upon the number of hours no longer worked via furloughs.<sup>19</sup> This Article

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that would have normally been paid work time, and it can be implemented voluntarily or through employer mandate.

<sup>17</sup> See, e.g., *Companies Turn to Furloughs to Save Money, Jobs*, 5 WRAL, Mar. 25, 2009, <http://www.wral.com/5onyourside/story/4813035/>. A California state worker, Kendall Koller, noted the inevitability of these efforts by stating that "we would rather take a pay cut than see co-workers and friends sent packing into the turbulent, and honestly, scary world of the unemployed." Ortiz, *supra* note 13.

<sup>18</sup> For example, Utah's program does not include a change in salary for employees and merely involves a schedule change where employees work the same forty hours per week in the form of four ten-hour days. Lynne Peeples, *Should Thursday Be the New Friday? The Environmental and Economic Pluses of the 4-Day Workweek*, SCI. AM., July 24, 2009, <http://www.scientificamerican.com/article.cfm?id=four-day-workweek-energy-environment-economics-utah>; Walsh, *supra* note 9. Accordingly, the Utah program does not represent the concerns of employees and their unions that are the focus of this Article (i.e., salary reductions pursuant to an unpaid furlough). Similarly, the type of flexible or compressed work schedules that are quite familiar and authorized by law in the federal government do not represent any of the concerns expressed in this Article as they do not involve reduced wages. The Federal Employees Flexible and Compressed Work Schedules Act of 1982 was passed in order to implement flexible family-friendly work policies for federal workers. 5 U.S.C. § 6120 (2006). The goal of this Act was to give federal employees a better work/life balance, which would lead to less absenteeism and decrease turnover rates. *Id.* Under this Act, the head of each executive department was directed to establish a family-friendly program to include work arrangements such as job-sharing, part-time employment, telecommuting, and alternative work schedules. *Id.* The Act also sets out a framework for implementing the program and addresses issues such as: identifying positions that are suitable for flexible work schedules; adopting policies to increase opportunities for employees to take advantage of flexible work arrangements; providing the training necessary to implement the program; and identifying barriers to the program and addressing them. *Id.*

<sup>19</sup> Such concerns only apply to lower-paid workers who are not exempt from coverage under federal wage-hour law and must be paid on an hourly basis, not a salary basis. See Lawrence P. Postol, *The New FLSA Regulations Concerning Overtime Pay*, 20 LAB. LAW. 225, 234-37 (2004). Under federal wage-hour law, if an employer reduces the salaries of any exempt workers by a day's pay, the employer will destroy the exemption because if exempt employees work at all during a work week, they must be paid their full salary for that week regardless of the number of hours worked. *Id.* at 236;

argues that four-day work weeks occurring as a result of an unpaid furlough day should be viewed as having a long-term negative impact on employees. When tough economic times occur, employees' concerns about wages, hours, and better conditions of employment receive little outside sympathy.<sup>20</sup> At that time, collective solidarity among employees becomes even more important to hold the line. Employees should thus collectively position themselves, either through their unions or legislation, to get paid leave benefits in exchange for giving up any wages via a furlough.<sup>21</sup>

Part II of this Article explores the development of reduced work week initiatives including the more recent fiscal efforts by a number of state and local governments and some private sector employers. First, those short-term initiatives that stem the tide of unemployment concerns by preventing layoffs without salary reductions are discussed. Second, those initiatives where employers have also reduced their employees' incomes as a response to the current recession are considered along with the rhetoric regarding an employer's sympathetic motivation to help employees keep their jobs.<sup>22</sup> Part II also provides a comparison of these employer-led initiatives with a number of reduced work week initiatives aimed at improving employees' working conditions and family life.

Part III of this Article identifies concerns that employees and unions should consider when deciding whether to accept an employer's offer to reduce salaries and weekly work hours via furloughs. Part IV of this Article describes a framework for unions and employees to take a collective approach to answering the call for four-day work weeks with an unpaid furlough day. Whether negotiated by unions or through legislative activity, collective employee efforts to improve paid leave time can support the purported benefits of balanced hours and family life expressed

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U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #17G: SALARY BASIS REQUIREMENT AND THE PART 541 EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), available at [http://www.dol.gov/whd/regs/compliance/fairpay/fs17g\\_salary.pdf](http://www.dol.gov/whd/regs/compliance/fairpay/fs17g_salary.pdf).

<sup>20</sup> See Carla Marinucci, *Public Outrage Weakened Threat of BART Strike*, S.F. CHRON., Aug. 18, 2009, at A1 (describing significant public outrage at proposed strike activity by transit workers in the Bay Area); Jon Ortiz, *State Workers May Authorize a Strike, But Action Is Seen as Unlikely*, SACRAMENTO BEE, July 27, 2009, at 1A ("[I]t's unlikely that an inconvenienced public struggling with high unemployment would sympathize with a walkout . . . [a]n effective strike could backfire by angering the public and creating a backlash.").

<sup>21</sup> Cf. Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1928, 1939-46 (2000) (discussing the value of paid work and suggesting a broad strategy to provide every person paid work). Although beyond the scope of this Article, which focuses on providing paid leave as a universal and broad strategy to help overworked and underemployed workers, I agree with Professor Schultz that paid work has to encompass a living wage where the pay allows the employee to do something more than barely survive to make ends meet. *Id.* at 1946-47. See also Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 43-45 (2000).

<sup>22</sup> See Petrecca, *supra* note 14 (stating that while furloughs are a "job-saving action by the employer," the employer's motivation behind furloughs is not entirely altruistic as employers save on severance costs, and future rehiring and retraining expenses when the economy improves).



by reduced work week advocates. Those benefits can converge with the recent phenomenon of employer-led initiatives that allow employees to work less instead of losing their jobs.

Finally, the Article concludes by focusing on the fact that employers need to partner with employees and their unions when dealing with working time issues and layoffs during the current jobs crisis. Generating and maintaining jobs has become such an important issue for American workers in 2010 that only collaborative efforts will bring forward the best of what America has to give to address our current employment problems. If reduced or four-day work weeks with unpaid furlough days represent an appropriate response to the economic crisis, employees and their unions should be offered opportunities to work with their employers to determine the best approach to develop and implement those options.

## II. THE RATIONALE FOR THE FOUR-DAY WORK WEEK: LAYOFFS AVERTED, EMPLOYER FINANCIAL BENEFITS, AND BETTER WORKING CONDITIONS FOR EMPLOYEES AND FAMILIES BY WORKING LESS

Key organizations dedicated to civil rights and labor—including the NAACP, the National Council of La Raza, and the AFL-CIO—have made it clear that there must be a response to the jobs crisis that has arisen in America.<sup>23</sup> At the start of 2010, employers still appear reluctant and uncertain about hiring permanent workers but have begun to increase their hiring of temporary workers as a sign of an improving economy.<sup>24</sup> Although unemployment numbers decrease as these job seekers come off the unemployment rolls, the economic problems regarding underemployment are exacerbated because temporary workers tend to have less pay and no benefits.<sup>25</sup> Accordingly, it is crucial to spur employer

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<sup>23</sup> See Steven Greenhouse, *N.A.A.C.P. Prods Obama on Job Losses*, N.Y. TIMES, Nov. 17, 2009, at A22. Several commentators have also noted that the jobs crisis is the key issue for 2010. E.g., Bob Herbert, *Igniting the Growth of Jobs*, N.Y. TIMES, Oct. 10, 2009, at A23; Paul Krugman, *The Jobs Imperative*, N.Y. TIMES, Nov. 30, 2009, at A31.

<sup>24</sup> Louis Uchitelle, *Jobs Data Shows a Surge in Hiring of Temp Workers*, N.Y. TIMES, Dec. 21, 2009, at A1.

<sup>25</sup> *Id.* See also Peter S. Goodman, *85,000 More Jobs Cut in December, Fogging Outlook*, N.Y. TIMES, Jan. 9, 2010, at A1 (“The so-called underemployment rate—which counts people who have given up looking for work and those who are working part time for lack of full-time positions—now sits at 17.3 percent.”). Further, the use of furloughs on a regular basis could be a methodology that masks the problem of unemployment while increasing underemployment, especially when employees may be more willing to accept fewer employee benefits just to have a job. See, e.g., Andrea H. Brustein, Comment, *Casual Workers and Employee Benefits: Staying Ahead of the Curve*, 7 U. PA. J. LAB. & EMP. L. 695, 710 (2005) (describing how an employer used a mandatory unpaid vacation furlough to keep an employee’s work status casual and to prevent the need to provide employee benefits to the worker).

confidence enough to increase permanent hiring and create permanent jobs in 2010.<sup>26</sup>

A number of short-term options involving reduced work weeks may provide some respite from skyrocketing unemployment by staving off layoffs. Also, some of these reduced work week efforts are being led by employers who have apparently become concerned about saving costs by keeping highly productive employees and offering them the retention of their jobs, albeit with less income due to working fewer hours. The rationale for these employer-led efforts must be understood within the financial needs of the employer in such times. By reviewing reduced work initiatives that benefit employees in terms of better work hours along with more time for family, this exploration can help employees and their unions in collectively deciding whether specific employer-led initiatives should also be embraced.

#### A. A Short-Term Response to the Massive Unemployment Problem

The current jobs crisis springs from a global recession that began around 2008 and led to the United States experiencing its most difficult economic times since the Great Depression of the 1930s.<sup>27</sup> Although Congress passed legislation, including a \$700 billion bailout for key

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<sup>26</sup> Jackie Calmes, *Obama Sets Plan To Spur Job Creation*, N.Y. TIMES, Dec. 9, 2009, at B1. President Obama intends to seek additional congressionally-approved financial stimulus in 2010 to spur hiring for more permanent jobs and to provide tax benefits to small businesses. *Id.*

<sup>27</sup> Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 966–67 & nn.3–10 (2009); Ben S. Bernanke, Chairman of the Bd. of Governors of the Fed. Reserve, Remarks at the Federal Reserve Bank of Kansas City's Annual Economic Symposium (Aug. 21, 2009), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20090821a.htm>. There are some commentators who have noted that the economic problems we are currently facing have never actually reached the level of problems that were present during the Great Depression. See, e.g., Paul Detrick, *Stanford Prof.: U.S. "Not in Anything Resembling" Great Depression*, BUS. & MEDIA INST., Nov. 20, 2008, <http://businessandmedia.org/articles/2008/20081120142729.aspx>; Posting of Justin Lahart to Real Time Economics, <http://blogs.wsj.com/economics/2008/12/05/defining-depression/> (Dec. 5, 2008, 15:59 EST). In responding to questions after giving a speech in December 2008, Ben Bernanke, Chairman of the Federal Reserve Bank and a noted historian regarding the events of the Great Depression, suggested that the financial problems of the last two years do not approach the problems of the Great Depression, during which the unemployment rate had risen to twenty-five percent, one-third of all banks fell, and the stock market fell ninety percent. *Bernanke Says Crisis 'No Comparison' to Great Depression*, AFP, Dec. 1, 2008, <http://www.google.com/hostednews/afp/article/ALeqM5gzwiRk81qjTxmJYcbbCuXLWX0urA>; Posting of Matt Welch to Reason, <http://reason.com/blog/2008/12/02/no-depression> (Dec. 2, 2008). Whether the actual economic figures match those of the Great Depression does not change the fact that the United States has experienced a recession since December 2007, and significant economic problems within the last two years have forced Congress to pass a \$787 billion stimulus package. Louis Uchitelle, *In Surprise, Jobless Rate Fell to 10% in November*, N.Y. TIMES, Dec. 5, 2009, at A1. Quite possibly, Bernanke's actions to stem the tide may represent the reasons why recent economic figures have not yet approached the extreme levels of the Great Depression. Michael Grunwald, *Ben Bernanke: The 2009 Time Person of the Year*, TIME, Dec. 28, 2009, at 44.

financial institutions in October 2008<sup>28</sup> and a \$787 billion stimulus package in February 2009,<sup>29</sup> the continued spiral of unemployment in 2009 has raised questions about the validity of these legislative actions.<sup>30</sup> As a possible sign of recovery, however, the rate of unemployment dipped from its highest point in October 2009 of 10.2% to just 10% for November 2009.<sup>31</sup> The unemployment rate held steady in December 2009, even while most economists predicted that unemployment numbers will worsen in 2010.<sup>32</sup> To ease concerns about creating jobs for 2010, some proponents have suggested that the federal government should pursue ways to shorten the work week as a means to stimulate job growth.<sup>33</sup> The primary statute that regulates wages and the hours of work during a work week in the United States is the Fair Labor Standards Act of 1938 ("FLSA").<sup>34</sup> The FLSA sets standards for minimum wages and discourages employers from overworking employees by mandating an additional salary premium of one and a half the regular rate of pay for all hours worked over forty in a work week.<sup>35</sup>

<sup>28</sup> On October 3, 2008, Congress passed the Emergency Economic Stabilization Act of 2008. Pub. L. No. 110-343, 122 Stat. 3765 (2008). This law created the Troubled Asset Relief Program ("TARP") and provided for the bailout of certain key financial institutions through a "maximum authorization of \$700 billion to support the stabilization of the U.S. financial system." Bernanke, *supra* note 27.

<sup>29</sup> On February 17, 2009, Congress passed the American Recovery and Reinvestment Act of 2009. Pub. L. No. 111-5, 123 Stat. 115 (2009). This law, encouraged by President Obama shortly after his inauguration, provided a stimulus package of \$787 billion to stem the tide of the economic crisis. *Economic Stimulus*, N.Y. TIMES, Dec. 9, 2009, [http://topics.nytimes.com/top/reference/timestopics/subjects/u/united\\_states\\_economy/economic\\_stimulus/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/u/united_states_economy/economic_stimulus/index.html).

<sup>30</sup> See Goodman, *85,000 More Jobs*, *supra* note 25. As a response to questions about the impact of the \$787 billion stimulus package passed by Congress in 2009, economists in the Obama administration asserted that it created or saved at least 1.6 million jobs. Uchitelle, *supra* note 27. Part of the stimulus package offered money to the states that may have helped to reduce unemployment by preventing layoffs of teachers, firefighters, police officers, and other public servants. *Id.* President Obama has asserted that the 2009 stimulus package will continue to provide jobs as many road-building and construction projects remain in the pipeline for 2010, but he also has recognized that more needs to be done in 2010. Calmes, *supra* note 26. For 2010, President Obama plans to focus on another congressionally-approved stimulus package of tax cuts for small businesses and spending to provide additional jobs. *Id.*; Goodman, *85,000 More Jobs*, *supra* note 25.

<sup>31</sup> Uchitelle, *supra* note 27. Regardless of the continued existence of double-digit unemployment, a new consensus of economists and experts agree that nine months after its passage, the stimulus package did help the economy "to grow again and shed fewer jobs than it otherwise would." Jackie Calmes & Michael Cooper, *New Consensus Views Stimulus Package as Worthy Step*, N.Y. TIMES, Nov. 21, 2009, at A1.

<sup>32</sup> U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS: EMPLOYMENT SITUATION NEWS RELEASE (2009), available at [http://www.bls.gov/news.release/archives/empst\\_01082010.htm](http://www.bls.gov/news.release/archives/empst_01082010.htm). Unless otherwise indicated, this Article addresses unemployment data through December 2009.

<sup>33</sup> E.g., Dean Baker, *Pass the Stimulus—Then Help Shorten the Work Week*, N.Y. DAILY NEWS, Jan. 27, 2009, [http://www.nydailynews.com/opinions/2009/01/28/2009-01-28\\_pass\\_the\\_stimulus\\_then\\_help\\_shorten\\_the.html](http://www.nydailynews.com/opinions/2009/01/28/2009-01-28_pass_the_stimulus_then_help_shorten_the.html).

<sup>34</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>35</sup> *Id.* § 207(a)(1). The premium on overtime under the FLSA was intended to reduce unemployment by putting more pressure on employers to hire more workers instead of overworking the ones currently employed. Natalie Slavens Abbott, Comment, *To Pay or Not To Pay: Modernizing the Overtime Provisions of the Fair Labor Standards Act*, 1 U. PA. J. LAB. & EMP. L. 253, 256 (1998).

According to Dean Baker, economist and co-director of the Center for Economic and Policy Research, an initiative that would shorten the work week from the forty-hour standard in the United States “would mean roughly proportionate reductions in pay, but there would be the offsetting benefit of more leisure time . . . [which] would bring us more in line with the rest of the world, where the standard [work week] and year is considerably shorter.”<sup>36</sup> In addition to the family-friendly aspects of a shorter work week, Baker also notes that such action would be environmentally friendly, too, as it could perhaps “reduc[e] the congestion at rush hours and . . . reduce the number of commutes.”<sup>37</sup>

Rather than mandate a work week with reduced hours through legislative amendment of the FLSA, Baker believes that the federal government should offer tax incentives to employers to reduce the number of hours in the work week and provide more time off for paid leave to be used for vacations, sickness, and parenting.<sup>38</sup> According to Baker, this will generate increased employment as demand will be the same since employees will have the same take-home pay when the government supplement is added, but employers will need to hire more employees to do the work when other employees are off due to paid leave.<sup>39</sup>

Despite the existence of various proposals to address the unemployment problem, it does not appear that the Obama administration

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<sup>36</sup> Posting of Dean Baker to Room for Debate, <http://roomfordebate.blogs.nytimes.com/2009/03/29/europes-solution-take-more-time-off/#dean> (Mar. 29, 2009, 20:00 EST).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* A number of economists are critical of the notion that a reduced work week will generate more jobs and have attacked this sentiment under a doctrine referred to as the “‘lump of labor’ fallacy.” See, e.g., Bruce Bartlett, *Lump of Labor Pains*, NAT’L REV. ONLINE, Oct. 8, 2003, [http://www.nationalreview.com/nrof\\_bartlett/bartlett200310080837.asp](http://www.nationalreview.com/nrof_bartlett/bartlett200310080837.asp) (reviewing France’s efforts to reduce the work week and suggesting that those efforts failed to reduce unemployment); Edward L. Glaeser, *Program Has Clunky Reasoning*, BOSTON GLOBE, Aug. 8, 2009, [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/08/08/program\\_has\\_clunky\\_reasoning/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/08/08/program_has_clunky_reasoning/) (arguing that the lump of labor theory is a fallacy as the “history of Europe’s labor markets illustrates that more regulations makes hiring less attractive and reduces the total amount of work done in a society”); Paul Krugman, *Lumps of Labor*, N.Y. TIMES, Oct. 7, 2003, at A27 (discussing how France operated under the lump of labor fallacy in an attempt to create more jobs through reducing work hours). But see Tom Walker, *The “Lump-of-Labor” Case Against Work-Sharing*, in WORKING TIME 196, 197 (Lonnie Golden & Deborah M. Figart eds., 2000) (tracing the history of the fallacy and attacking its validity as a legitimate criticism as to why shorter work week efforts will not create more jobs). Under the lump of labor fallacy argument, the concept is that work is finite and therefore removing one worker from the equation (possibly via shorter hours of work) does not necessarily mean you will have to replace the worker as other factors go into the element of work that are not finite. Bartlett, *supra*. For further analysis of why the lump of labor fallacy should not be used as a method to attack shorter hours of work efforts, see Walker, *supra*, at 197. Regardless, economists still posit that shorter work weeks can reduce unemployment and have raised the issue of reducing unemployment as a basis for adopting a shorter work week. E.g., Baker, *Pass the Stimulus*, *supra* note 33. Paul Krugman does not contradict his earlier points about the lump of labor fallacy when he offers support for reduced work hours during tough economic times because he views this option as a means to prevent increasing unemployment given that it will stave off layoffs. Compare Krugman, *Lumps of Labor*, *supra*, with Paul Krugman, *Free to Lose*, N.Y. TIMES, Nov. 13, 2009, at A31.

plans to pursue a reduced work week as part of the job recovery effort for 2010.<sup>40</sup> Regardless of whether a reduction in hours worked will decrease unemployment by adding jobs<sup>41</sup> or merely act as a plug in the dike to stop the further spiral of job losses related to the current recession,<sup>42</sup> any plan for a reduced work week or some form of reduced working hours would appear to offer important opportunities for employers and employees, at least as a short-term response.<sup>43</sup>

Beyond the argument for reducing or maintaining the levels of unemployment given the dire circumstances at issue for 2010, the four-day work week<sup>44</sup> and other efforts, such as partial unemployment work sharing,<sup>45</sup> that reduce the number of days an employee spends working

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<sup>40</sup> See Krugman, *Free to Lose*, *supra* note 39.

<sup>41</sup> Baker, *Room for Debate*, *supra* note 36; Walker, *supra* note 39, at 197.

Fortunately, there is an easy and quick way to begin to get these unemployed workers back to work. It involves paying workers to work shorter hours. The mechanism can take the form of a tax credit to employers. The government can give them a tax credit of up to \$3,000 to shorten their workers' hours while leaving their pay unchanged. The reduction in hours can take the form of paid sick days, paid family leave, shorter workweeks or longer vacations. The employer can choose the method that is best for her workers and the workplace.

If take-home pay is left unchanged as a result of the credit, then demand should be left unchanged. If workers are putting in fewer hours and demand is unchanged, then employers will need to hire more workers.

Dean Baker, *Solution to Unemployment: Pay People to Work Shorter Hours*, NATION, Nov. 17, 2009, <http://www.thenation.com/doc/20091130/baker>.

<sup>42</sup> Krugman, *Free to Lose*, *supra* note 39.

<sup>43</sup> *Id.*

<sup>44</sup> See Larry Copeland, *Most State Workers in Utah Shifting to 4-Day Week*, USA TODAY, July 1, 2008, at 2A. Other municipalities have also offered four-day work weeks with mixed success. See Jennifer Gollan, *Do Four-Day Work Weeks Work? Governments Report Mixed Results, But Employees Love It*, S. FLA. SUN-SENTINEL, Aug. 12, 2009, <http://www.sun-sentinel.com/news/palm-beach/sfl-palm-four-day-workweek,0,2086100.story> (noting how some Florida cities are proponents of the four-day work week because of the cost savings on electric bills, building maintenance, and gas, as well as because employees call in sick less frequently, work less overtime, and schedule medical appointments on their day off).

<sup>45</sup> Neil Ridley, a senior policy analyst from the Center for Law and Social Policy, provides the following explanation for partial unemployment work sharing:

Work sharing, also called short-time compensation, is a special Unemployment Insurance (UI) program that softens the impact of a business downturn on workers, employers and the government. Under work sharing, an employer reduces the hours of work for all workers in a firm or business unit instead of laying off a portion of the workforce. Workers then receive partial UI benefits to help compensate for the lost hours of work.

NEIL RIDLEY, CTR. FOR LAW & SOC. POLICY, WORK SHARING—AN ALTERNATIVE TO LAYOFFS FOR TOUGH TIMES 1 (2009), available at <http://www.clasp.org/admin/site/publications/files/0481.pdf>. Some private sector employers are starting to use this unemployment insurance short-time compensation benefit. See Anthony Clark, *Is 4-Day Work Week the Answer in Tough Times?*, GAINESVILLE SUN, Apr. 5, 2009, <http://www.gainesville.com/article/20090405/ARTICLES/904051005/1002/news?> (describing use of this unemployment insurance program in Florida as a supplement to the four-day work week reduction in pay); Michael Neibauer, *D.C. Council Members Propose "Partial Unemployment" Program*, WASH. EXAMINER, Dec. 4, 2009, available at [http://www.washingtonexaminer.com/local/D\\_C\\_-Council-members-propose-\\_partial-unemployment\\_-\\_program-8617337.html](http://www.washingtonexaminer.com/local/D_C_-Council-members-propose-_partial-unemployment_-_program-8617337.html) (describing efforts to provide a reduction in hours for city employees so they could obtain short-term compensation via unemployment benefits for the reduced hours of work); Tony

while maintaining the same salary offer additional benefits to the public. Those benefits include reduced environmental costs related to less commuting and more time for facilities to reduce their ecological footprint.<sup>46</sup> Albeit by government mandate, these reduced work week efforts help workers stay employed and maintain their benefits while also preventing a reduction in their wages. Further, to the extent that Dean Baker's proposal is adopted, it would create better benefits for the currently employed and underemployed by providing for more paid time off from work.<sup>47</sup>

### B. Employer Benefits: Reduced Turnover and Offering Employee Sympathy

The question of how American employers perceive shorter work weeks and initiatives to reduce working time represents an important factor in assessing the overall value of these responses. When employers lead these initiatives, one must be wary of an employer's economic incentives to make employees work more for less, which may circumvent any employee benefits derived from reduced work time. Certainly, employers will perceive a great benefit from the reduced work week when it comes with fewer wages, as occurs with the increasing use of unpaid furloughs.<sup>48</sup> In fact, shorter work weeks with unpaid "[f]urloughs may be the strategy du jour" for employers to respond to economic downturns.<sup>49</sup>

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Pugh, *Obama Urged To Turn Successful Job Program National*, MCCLATCHY NEWS, Nov. 11, 2009, <http://www.mcclatchydc.com/227/story/78720.html> (describing how short-term compensation work sharing via unemployment benefits programs has "skyrocketed since the economy tanked in December 2007" and how these programs are available in various states).

<sup>46</sup> David Roberts, *All in a Day's Work*, FAST COMPANY, May 1, 2008, available at <http://www.fastcompany.com/magazine/125/all-in-a-days-work.html>; see Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENV'T'L L.J. 141, 141 (1998). For further discussion of the environmental impacts of sprawl and the four-day work week appearing in this Symposium Issue, see generally Katharine B. Silbaugh, *Sprawl, Family Rhythms, and the Four-Day Work Week*, 42 CONN. L. REV. 1267 (2010).

<sup>47</sup> Baker, *Pass the Stimulus*, *supra* note 33; Baker, *Solution to Unemployment*, *supra* note 41.

<sup>48</sup> See Erin Ailworth, *Going Without To Keep Firms Going*, BOSTON GLOBE, May 12, 2009, [http://www.boston.com/business/articles/2009/05/12/going\\_without\\_to\\_keep\\_firms\\_going/?page=full](http://www.boston.com/business/articles/2009/05/12/going_without_to_keep_firms_going/?page=full) (describing a survey of 518 U.S. companies in April 2009 that found that "nearly 70 percent have implemented or are considering furloughs" as "an important technique to save some jobs"); Tresa Baldas, *Employment Lawyers Predict Furloughs May Lead to Lawsuits*, NAT'L L.J., May 19, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430831358> (discussing the increased use of furloughs and the potential wage hour law problems related to their use); Adrienne Fox, *Avoiding Furlough Fallout*, HR MAG., Sept. 2009, available at <http://www.shrm.org/Publications/hrmagazine/EditorialContent/Pages/0909fox.aspx> (stating that the number of people furloughed "shot to 6.5 million" in June 2009).

<sup>49</sup> Baldas, *supra* note 48. See also Beth Kowitt, *America Goes on Furlough*, FORTUNE, May 20, 2009, [http://money.cnn.com/2009/05/19/magazines/fortune/america\\_goes\\_on\\_furlough.fortune/index.htm](http://money.cnn.com/2009/05/19/magazines/fortune/america_goes_on_furlough.fortune/index.htm). In July 2009, the Department of Labor published a report with specific details to guide employers regarding the use of furloughs while ensuring the employers still comply with the FLSA. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMIN. WAGE & HOUR DIV., FREQUENTLY ASKED QUESTIONS REGARDING FURLOUGHS AND OTHER REDUCTIONS IN PAY AND HOURS WORKED ISSUES 1 (2009),

Many companies that were quite profitable, however, had no problem laying off employees in 2009.<sup>50</sup> On the other hand, a number of companies have recently found it to be financially beneficial to try to keep good workers employed while weathering the storm caused by the current recession.<sup>51</sup> These employers are merely choosing to cut their labor costs not by actually laying off employees, but instead by reducing the number of hours employees work and, as a result, their pay.<sup>52</sup> Some of these employers also view this decision not to lay off employees as a magnanimous gesture that has been initially well received and approved by employees who understand the difficulties of the current economic decline and recognize that the alternative is job loss.<sup>53</sup> This form of wage reduction, however, can only last for so long. Some employees will eventually want their former wages back and would rather have a full layoff as a more permanent result when compared to growing frustration in performing the same job for lower pay.<sup>54</sup>

The unique elements of the current recession have spurred this unusual approach of using reduced work weeks and unpaid furloughs instead of layoffs. According to Yale economist Truman Bewley, American employers normally tend to favor layoffs over arrangements such as furloughs and reduced work weeks “because layoffs eliminate the fixed expenses of employment, like benefits, administrative costs and the costs of maintaining a place for people to work.”<sup>55</sup> Bewley also asserts that employers “tend to believe that the best way to handle a business downturn is to maintain a core group of key employees, encourage its morale by giving raises and laying off so many employees that those who remain have a little too much to do.”<sup>56</sup> This admittedly “grim” approach to

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available at <http://www.dol.gov/WHD/flsa/FurloughFAQ.pdf>. This new guidance covers topics including: whether hourly employees must receive their paycheck on their regularly scheduled payday; reducing workers' salaries, wages, or hours; the amount of pay required for partial days worked; reducing accrued leave during furloughs; whether employees are on-call during furloughs; and special rules for public employee furloughs. *Id.* at 1–4.

<sup>50</sup> See, e.g., Andrea Orr, *Many Highly Profitable Companies Cut Jobs in 2009*, ECON. POL'Y INST., Dec. 23, 2009, available at [http://www.epi.org/analysis\\_and\\_opinion/entry/many\\_highly\\_profitable\\_companies\\_cut\\_jobs\\_in\\_2009](http://www.epi.org/analysis_and_opinion/entry/many_highly_profitable_companies_cut_jobs_in_2009) (listing Microsoft, Wal-Mart, IBM, Aetna, Danaher, Verizon, Monsanto, and Phillip Morris as examples).

<sup>51</sup> See Matt Richtel, *More Companies Cut Labor Costs Without Layoffs*, N.Y. TIMES, Dec. 22, 2008, at A1.

<sup>52</sup> See *id.*; Baldas, *supra* note 48; Fox, *supra* note 48.

<sup>53</sup> Richtel, *supra* note 51; Cari Tuna, *Weighing Furlough Versus Layoff*, WALL ST. J., Apr. 13, 2009, at B6.

<sup>54</sup> See, e.g., Michelle Goodman, *All I Want for Christmas Is a Layoff*, ABC NEWS, Dec. 24, 2009, <http://abcnews.go.com/Business/christmas-layoff/story?id=9411010>.

<sup>55</sup> Posting of Truman Bewley to Room for Debate, <http://roomfordebate.blogs.nytimes.com/2009/03/29/europes-solution-take-more-time-off> (Mar. 29, 2009, 20:00 EST). See also Tuna, *supra* note 53 (identifying views of various “workplace experts [who] say layoffs often are more efficient” because treating everyone the same with a furlough, as opposed to laying off the least productive employees, may turn off the high performers; therefore, “it just makes sense” to lay off less productive workers).

<sup>56</sup> Bewley, *supra* note 55.

management during poor economic times assumes that employers were already employing a number of non-productive employees.<sup>57</sup> As concerns about the current recession began, however, employers tightened their belts and used intricate performance tracking systems to make sure that they had already retained the most productive workers.<sup>58</sup> Accordingly, the desire to keep those productive workers on board during a difficult economic period could present a specific financial advantage in terms of reduced turnover, recruitment, and performance evaluation costs.<sup>59</sup>

Therefore, and despite the rhetoric of employers' sympathy in not laying off employees, employers' efforts to seek reduced work weeks and unpaid furloughs should not be considered an overall compassionate act. These actions, when taken to address a downward economic or business cycle, merely seem to be another way for an employer to focus on its own bottom line.<sup>60</sup> There are some employers, however, possessing a good relationship with employees and unions, that have tried to collectively brainstorm the best way to make it through the economic challenges. Those employers have openly discussed the prospect of layoffs or other less drastic measures such as reduced work weeks, unpaid furloughs, and job sharing and have actively sought employee input before taking action.<sup>61</sup> While costs alone may not be the only objective of employers who work with their employees to resolve these issues, it is clear that by circumventing layoffs, employers save even more money (i.e., reducing costs in turnover and training) when they focus on keeping their top performers.<sup>62</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Richtel, *supra* note 51. See also Kowitt, *supra* note 49 (noting that in the past, employers would typically use layoffs, but many businesses during the recent recession were "already operating with lean staffs" so that "further reductions would only impede workflow").

<sup>59</sup> Richtel, *supra* note 51. John Challenger, chief executive of a Chicago-based outplacement company that tracks layoffs, suggests that efforts, such as reduced work weeks and furloughs, were being employed instead of layoffs because "employers were being driven now not by compassion but by hard calculations based on data . . . to track employee performance and productivity, and in many cases they know that the workers they would cut are productive ones." *Id.* See also Tuna, *supra* note 53; Patrick Rupinski, *Hanging On: Pay Cuts, Shorter Work Weeks Allow People To Keep Their Jobs, Benefits*, TUSCALOOSA NEWS, Feb. 23, 2009, <http://www.tuscaloosanews.com/article/20090223/NEWS/902211968/1007>.

<sup>60</sup> See Petrecca, *supra* note 14; Tuna, *supra* note 53.

<sup>61</sup> See, e.g., Rick Moriarty, *How the Recession Forced an Old Company To Adopt New Ways*, POST-STANDARD, Nov. 29, 2009, at A1. In order "[t]o stave off disaster," the general manager at Oberdorfer LLC laid off more than half of the workforce, but worked actively with the employees and the union representing them to enhance productivity by meeting monthly with employees and sharing financial data. *Id.* The union and its membership agreed to unpaid furloughs and arrangements to train other workers on their jobs so that the work could be shared, and allowed temporary transfers between departments as long as wages were not cut—eventually the company started to rebound as it recently recalled some of its laid off workers. *Id.*

<sup>62</sup> See Joan C. Williams, *The Family-Hostile Corporation*, 70 GEO. WASH. L. REV. 921, 924–25 (2002); Petrecca, *supra* note 14; Richtel, *supra* note 51.



### C. Employee Benefits: Fair Wages, Hours of Work, and Family-Friendly

Someone might accuse employees who would reject an offer of less work for less pay in lieu of a layoff for being penny-wise and pound-foolish. Worrying about the small loss of income in light of risking their entire job seems strange when jobs represent such a scarce commodity right now.<sup>63</sup> ABC News business columnist Michelle Goodman, however, has explained that although the unemployed may be “scowling about all the hand-wringing over a job a person actually has,” a number of employees would choose a layoff instead of less income when an employer experiences financial difficulties.<sup>64</sup> These employees would prefer the option of collecting severance pay and unemployment compensation rather than continuing to toil away with dissatisfaction in a job that will become even more stressful when pay cuts arise, along with an increasingly burdensome workload.<sup>65</sup> Further, an employee who agrees to less pay and fewer hours in a work week may end up losing out on eligibility for retirement and health insurance benefits, depending upon the number of hours worked and the amount of income required to retain those benefits.<sup>66</sup>

To evaluate any employer-offered initiative to reduce the work week from an employee's perspective, one must examine what benefits employees can derive by having to work less, even if it is without pay. The purported employee benefits of a reduced work week have primarily focused on two areas: (1) providing fair wages and safe working conditions as relief for employees who are overworked, while offering more work opportunities for the unemployed;<sup>67</sup> and (2) addressing

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<sup>63</sup> See Petrecca, *supra* note 14; Richman, *supra* note 14; Marcia Wade Tolbert, *Unpaid Furloughs Instead of Pink Slips*, BLACK ENTERPRISE, June 22, 2009, <http://www.blackenterprise.com/careers/2009/06/22/unpaid-furloughs-instead-of-pink-slips12>.

<sup>64</sup> See Goodman, *All I Want for Christmas*, *supra* note 54.

<sup>65</sup> *Id.*

<sup>66</sup> Anne Bancroft, *Effect of Furloughs on Employee Benefits*, WORK FORCE REDUCTIONS, July 6, 2009, <http://workforcereductions.foxrothschild.com/2009/07/articles/benefits/effect-of-furloughs-on-employee-benefits/>. See also Mark Berger, *The Contingent Employee Benefits Problem*, 32 IND. L. REV. 301, 304 & n.10 (1999) (describing how employers generally tend to provide full-time employees the “normal array” of fringe and health benefits but do not offer the same to those in contingent and flexible work and identifying how a number of benefit plans are geared towards employees who work on a full-time basis); Richman, *supra* note 14 (describing how a number of employers, in order to deal with the tough economic climate, are “reducing or eliminating 401(k) matching [and] absorbing fewer health insurance costs”). Employers have unfettered discretion to restrict or define employee benefit plan coverage options for part-time workers as long as the workers do not meet minimal federal law requirements based upon the total number of hours worked in a year of 1000 hours for benefits law and 1500 hours under tax law. Berger, *supra*, at 344–45 n.266.

<sup>67</sup> See Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 2–3, 15 (2001) (describing the goals of the FLSA and the forty-hour work week as intended to provide workers with “unwaivable substantive rights” and providing standards for overtime pay to discourage an atmosphere of overworked and underpaid workers). Professor Lonnie Golden has written a number of key articles that explain the FLSA and critique its impact in terms of overworking employees through overtime. See, e.g., Lonnie Golden, *Working Time and the Impact of Policy Institutions*, 56 REV. SOC. ECON. 522, 525–30 (1998); Lonnie Golden & Barbara Wiens-Tuers, *Mandatory Overtime Work in the United*

concerns about balancing family and work issues, including gender issues regarding unfair expectations placed on working women as family caregivers.<sup>68</sup>

### 1. *Better Wages and Hours of Work for the Overworked*

On May 25, 2007, the Fair Minimum Wage Act<sup>69</sup> established current minimum wages for workers covered by the FLSA. It amended the FLSA and increased the federal minimum wage in three stages: (1) \$5.85 per hour on July 24, 2007; (2) \$6.55 per hour on July 24, 2008; and (3) \$7.25 per hour as of July 24, 2009.<sup>70</sup> Despite this increased minimum wage protection and the premium protection for overtime hours worked beyond forty in a work week, there is no law guaranteeing employees any entitlement to paid benefits. Further, several white collar job classifications including executive, professional, and administrative employees are exempt from the overtime premium payment coverage under the FLSA.<sup>71</sup> Accordingly, American employers are motivated to overwork their white collar employees who are exempt from the overtime premium (time and a half) and, in addition, the lack of paid benefits for time off for lower-wage earners creates incentives for those employees to keep working and generate overtime compensation.<sup>72</sup> As a result, American workers tend to be much more overworked in comparison to workers in other countries.<sup>73</sup>

When assessing opportunities for leave time for overworked American employees, unpaid leave is provided by the Family and Medical Leave Act ("FMLA").<sup>74</sup> An employer must have at least fifty employees to be subject

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*States: Who, Where, and What?*, 30 LAB. STUD. J. 1, 12 (2005); Lonnie Golden & Barbara Wiens-Tuers, *Overtime Work and Wellbeing at Home*, 66 REV. SOC. ECON. 25, 30 (2008); Lonnie Golden & Barbara Wiens-Tuers, *To Your Happiness? Extra Hours of Labor Supply and Worker Well-Being*, 35 J. SOCIO-ECON. 382, 384–85 (2006). For Professor Golden's discussion on issues directly related to this Symposium, see generally Lonnie Golden, *A Purpose for Every Time? The Timing and Length of the Work Week and Implications for Worker Well-Being*, 42 CONN. L. REV. 1181 (2010).

<sup>68</sup> See Schultz & Hoffman, *supra* note 5, at 131–33.

<sup>69</sup> Pub. L. No. 110-28, 121 Stat. 112 (2007).

<sup>70</sup> *Id.*

<sup>71</sup> See Postol, *supra* note 19, at 228–29.

<sup>72</sup> Kenneth G. Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 IND. J. GLOBAL LEG. STUD. 165, 172 (2006); Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 164 (1994); Schultz & Hoffmann, *supra* note 5, at 139; Williams, *The Family-Hostile Corporation*, *supra* note 62, at 923. Under the FLSA, "[m]ost employers find it more efficient to pay overtime than to hire more workers." TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* 72 (2002) (citing SCHOR, *supra* note 4, at 66–68).

<sup>73</sup> See REBECCA RAY & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, *NO-VACATION NATION 1* (2007), available at <http://www.cepr.net/index.php/publications/reports/no-vacation-nation> (comparing paid vacation requirements in the United States and twenty other countries); see also Miller, *supra* note 67, at 47 (describing literature related to the overworked American theory).

<sup>74</sup> 29 U.S.C. §§ 2601–2654 (2006).

to the requirements of the FMLA and its unpaid leave protection.<sup>75</sup> The FMLA protects employees who have to take leave due to their own serious health conditions or to care for the serious health condition of their own child, parent, or spouse.<sup>76</sup> Also, the FMLA allows employees to take time off for the birth of a child.<sup>77</sup> The FMLA authorizes a maximum of twelve weeks of unpaid leave on an annual basis as protection for employees needing to use leave covered by the FMLA.<sup>78</sup>

When the question of paid leave arises, however, almost all of the world economies guarantee paid time off and paid public holidays.<sup>79</sup> A majority of countries mandate a twenty-day minimum, and others have at least a ten-day minimum.<sup>80</sup> The United States operates in a class of its own by being the only industrialized country that does not require paid vacation days or paid leave days.<sup>81</sup> One in four American workers do not have paid vacations or paid holidays.<sup>82</sup> The average number of paid vacation days and paid holidays in the United States is fifteen, which only exceeds the minimum required by Japan and is lower than the minimum required by nineteen other countries.<sup>83</sup> Within the paid vacation and holidays that are offered to American workers, lower-paid wage earners are less likely to have paid time off compared to full-time high-wage earners.<sup>84</sup>

In addition to the full-time work week, countries also set the number of days worked per year.<sup>85</sup> Most European countries establish a legal right to twenty days of paid leave per year, and Canada and Japan mandate at least ten days off. The gap between the United States and the rest of the world is even larger if you include legally mandated paid public holidays—the United States offers none, but most of the world's other rich countries offer between five and thirteen paid public holidays per year.<sup>86</sup> In European countries, there is a statutory minimum of paid vacation and holiday entitlements; however, collective agreements often raise that minimum.<sup>87</sup> European Union workers typically get between twenty-eight and thirty-six days off for paid vacation and holidays. Japan and the United States are

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<sup>75</sup> *Id.* § 2611(2)(B)(ii).

<sup>76</sup> *Id.* § 2612(a)(1).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> RAY & SCHMITT, *supra* note 73, at 1.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Id.* at 1.

<sup>83</sup> *Id.* at 7.

<sup>84</sup> *Id.*

<sup>85</sup> JANET C. GORNICK ET AL., ECON. POLICY INST., THE WORK-FAMILY BALANCE 4 (2007), available at <http://www.sharedprosperity.org/bp189.html>.

<sup>86</sup> *Id.* at 4–5.

<sup>87</sup> See *id.* at 5 tbl.3 (showing, for example, that the statutory minimum in Germany is twenty days but when there is a collective agreement, it averages around twenty-nine days).

lower.<sup>88</sup> Japan provides about twenty-five days off per year, including paid holidays and a statutory-mandated ten paid vacation days.<sup>89</sup>

The United States has not addressed the work week at all since the FLSA in 1938, even though policy reforms to reduce the work week in other countries have had some effect in improving those countries' employee working conditions. Today, the United States even exceeds Japan in actual average hours of work.<sup>90</sup> Work time policies vary among the different countries.<sup>91</sup> In most of the European Union countries, the full-time work week is set by collective agreement and varies between thirty-five and thirty-nine hours per week.<sup>92</sup> Both Japan and the United States set hours via legislation at forty hours per week, and in the United States, collective bargaining reaches only a small share of workers.<sup>93</sup> France has gained notoriety for its efforts to reduce unemployment by mandating a work week of no more than thirty-five hours.<sup>94</sup> France's efforts to mandate a reduced work week, however, have generally been deemed unsettling as their effect on unemployment appears questionable, and the limitation on the hours of work resulted in claims by employers that France has lost part of its competitive flexibility and edge in the global market.<sup>95</sup>

While reduced work weeks help with work/family conflicts, many employees have gained shorter work weeks at the cost of more nonstandard or flexible work scheduling.<sup>96</sup> Employers have long yearned for an opportunity to prevent having to pay workers overtime—as required by federal wage-hour laws—by scheduling compensatory time off in exchange for working more than forty hours per week.<sup>97</sup> If the FLSA is ever amended to allow compensatory time off as a tool in setting schedules in the private sector as many businesses and Republicans in Congress desire,<sup>98</sup> there also need to be protective measures that divide control over

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1.

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.* at 3 tbl.2.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> *Id.* The impact of France's reduced hours requirement of thirty-five hours per week has been significantly debated. See, e.g., Naomi Cahn & Michael Selmi, *The Class Ceiling*, 65 MD. L. REV. 435, 453 (2006); Dau-Schmidt & Brun, *supra* note 72, at 192; Selmi & Cahn, *supra* note 6, at 21.

<sup>95</sup> See Dau-Schmidt & Brun, *supra* note 72, at 202–03; Bruce Crumley, *France Debates 35-Hour Work Week*, TIME, May 30, 2008, <http://www.time.com/time/world/article/0,8599,1810710,00.html>; Posting of Max Sawicky to Pajamas Media, [http://pajamasmedia.com/blog/france\\_one\\_step\\_forward\\_two\\_st/](http://pajamasmedia.com/blog/france_one_step_forward_two_st/) (May 7, 2007).

<sup>96</sup> GORNICK ET AL., *supra* note 85, at 1.

<sup>97</sup> See *infra* notes 227–33 and accompanying text (discussing the compensatory time off debate).

<sup>98</sup> Michael T. Liebig, *The Importance of Time Off: Valuing Restricted vs. Unrestricted Compensatory Time Under the Fair Labor Standards Act*, 47 S.D. L. REV. 511, 511–13 (2002). See also *infra* notes 227–33 and accompanying text.

scheduling between employers and workers so that employers do not use flexibility to overwork employees.<sup>99</sup>

## 2. *Providing a Family-Friendly Workplace*

Policies that reduce total work time and improve the quality of part-time work are crucial to improving work/family relationships as indicated by the positive experience in many European Union countries.<sup>100</sup> If, however, the policies also involve reducing wages, they may not be so family-friendly.<sup>101</sup> When considering reduced hours in the work week as an activity that may be encouraged by employers as providing some benefit to employee morale and overall productivity,<sup>102</sup> many commentators point to the efforts of the Kellogg Company during the Great Depression. Kellogg reduced the work day from eight hours to six hours and paid employees the same wages from a forty-hour week while only working a thirty-hour work week.<sup>103</sup> Kellogg's plan, initially aimed at keeping more workers employed, also generated gains in worker productivity.<sup>104</sup> In 1935, Kellogg claimed that "after 'five years under the six hour day,'" they found improved efficiency and production allowing them to "pay as much for six-hours as we formerly paid for eight."<sup>105</sup> As management changed and union members' interests changed, however, the six-hour day was eventually increased to eight hours.<sup>106</sup> While recognizing that the six-hour day reduced overtime, management was still concerned that the shorter work day would require the hiring of more workers and payment of more benefits.<sup>107</sup> The erosion of the six-hour work day at Kellogg represents a classic divide-and-conquer scenario as management convinced higher-wage male employees of the benefit of an even higher wage for more work hours, which contradicted the desire of a lot of women employees to keep wages the same for less hours.<sup>108</sup> As the divisions became more prominent, the company began "feminizing" the issue by referring to six-hour positions as "'women's work' or 'girls' departments'"

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<sup>99</sup> GORNICK ET AL., *supra* note 85, at 8.

<sup>100</sup> *Id.*

<sup>101</sup> Selmi & Cahn, *supra* note 6, at 12–13, 21–22.

<sup>102</sup> See Janice Peterson, *Study Finds Four-Day Work Week Optimal*, DAILY HERALD, June 9, 2008, [http://www.heraldextra.com/news/local/article\\_e5e96c0c-7ee6-5787-b46f-c8ac9990c440.html](http://www.heraldextra.com/news/local/article_e5e96c0c-7ee6-5787-b46f-c8ac9990c440.html) (describing a study by Lori Wadsworth and Rex Facer who found that sixty percent of employees working a four-day, ten-hour schedule reported higher productivity and employee morale). For updated commentary on this study, as presented at this Symposium, see generally Rex L. Facer II & Lori Wadsworth, *Four-Day Work Weeks: Current Research and Practice*, 42 CONN. L. REV. 1031 (2010).

<sup>103</sup> Schultz & Hoffman, *supra* note 5, at 148; Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER, RACE & JUST. 411, 425 (2002).

<sup>104</sup> Williams, *Our Economy*, *supra* note 103, at 425.

<sup>105</sup> BENJAMIN KLINE HUNNICUTT, KELLOGG'S SIX HOUR DAY 35 (1996).

<sup>106</sup> *Id.* at 86–87.

<sup>107</sup> *Id.* at 99.

<sup>108</sup> *Id.* at 99–100, 104.

and eight-hour positions as part of the “‘men’s departments.’”<sup>109</sup> Despite a long fight, Kellogg’s six-hour day finally ended in 1984.<sup>110</sup>

A few other American employers have focused on being family-friendly.<sup>111</sup> Other companies have considered making work more productive by requiring less.<sup>112</sup> For example, Chick-fil-A asserts that it truly cares about employees having the ability to take “‘a day off to spend with family and friends’” and backs it up by not being open on Sundays “‘without exception.’”<sup>113</sup> These companies may realize that actually working fewer hours may make employees more productive.<sup>114</sup> For example, a study conducted by Watson Wyatt found that providing workplace flexibility enhances employee efficiency and thus increases company profits.<sup>115</sup> Nevertheless, very few employers provide such policies.<sup>116</sup>

Accordingly, key family-friendly policy initiatives in the United States have been advanced more by feminists, who seek policies that reflect recognition of a work/family conflict.<sup>117</sup> Some feminist commentators have exposed the unique difficulties that working women face because they must share their time between work and family according to society’s expectations regarding the breakdown of those obligations.<sup>118</sup> For example, in 1989, Arlie Hochschild explained the significance of the greater expectations placed on working wives, versus working husbands, to perform housework and childcare when both the husband and wife work.<sup>119</sup>

<sup>109</sup> *Id.* at 103.

<sup>110</sup> *Id.* at 187.

<sup>111</sup> See, e.g., Schultz & Hoffman, *supra* note 5, at 148–49.

<sup>112</sup> See Leslie Kaufman, *Some Companies Derail the ‘Burnout’ Track*, N.Y. TIMES, May 4, 1999, at A1.

<sup>113</sup> Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense To Pay Too Little?*, 76 U. CHI. L. REV. 797, 819, 855 (2009).

<sup>114</sup> A 2005 survey by Microsoft found that some of the time spent during the work week is not productive. See Press Release, Microsoft Corp., *Survey Finds Workers Average Only Three Productive Days Per Week* (Mar. 16, 2005), available at <http://www.microsoft.com/presspass/press/2005/mar05/03-15ThreeProductiveDaysPR.msp>.

<sup>115</sup> Gregory Acs, *A Good Employee or A Good Parent? Challenges Facing Low-Income Working Families*, 4 U. ST. THOMAS L.J. 489, 502 (2007); Jodie Levin-Epstein, *Responsive Workplaces: The Business Case for Employment that Values Fairness and Families*, AM. PROSPECT, Mar. 2007, at A16.

<sup>116</sup> See Levin-Epstein, *supra* note 115.

<sup>117</sup> Schultz & Hoffman, *supra* note 5, at 132–34 (describing two basic approaches to the work/family conflict: (1) a “‘compensation’ approach” that funds women for the extra work they do outside the workplace; and (2) an “‘accommodation’ approach” that looks at accommodating the needs of women in the workplace to support their caretaking roles).

<sup>118</sup> See, e.g., Katharine K. Baker, *The Problem with Unpaid Work*, 4 U. ST. THOMAS L.J. 599, 599–601 (2007); Kirsten K. Davis, *The Rhetoric of Accommodation: Considering the Language of Work-Family Discourse*, 4 U. ST. THOMAS L.J. 530, 532–34 (2007); Jerry A. Jacobs & Kathleen Gersen, *Toward a Family-Friendly, Gender-Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 457, 472 (1998); Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 104, 124 (1998); Elizabeth R. Schlitz, *Workplace Restructuring to Accommodate Family Life*, 4 U. ST. THOMAS L.J. 343, 343–45 (2007).

<sup>119</sup> ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 1–10 (1989). See also Marilyn Snell, *Home Work Time*, MOTHER

In order to meet family and work expectations, working wives disproportionately have to work the equivalent of a second shift that husbands do not.<sup>120</sup> In 1997, Hochschild also noted that a “time bind” affects couples in the workplace as it prevents them from devoting more time to their children and families.<sup>121</sup> According to Hochschild, this time bind must be addressed by a progressive movement, including radical action that would merge the labor movement and the feminist movement with child advocates, progressive corporations, and the federal government “to push back on our hours of work” in an effort at “recovering our time.”<sup>122</sup> In response to such advocates, however, Michael Selmi and Naomi Cahn have highlighted that policy proposals from work/family scholars that focus on women giving up hours of work for the family often miss the fact that most women cannot afford to take reduced pay to have more time for family-friendly activities outside of work.<sup>123</sup>

Therefore, feminist efforts that focus on reducing work hours in order to provide a family-friendly workplace appear misplaced, especially during the current recession.<sup>124</sup> Instead, proposals to make the workplace more family-friendly need to be replaced by broader social interventions that affect all employees through collective approaches either by legislation or by union activity.<sup>125</sup> With respect to legislative action, one area of family-friendly workplace efforts does raise concern on a national level. There has been a huge increase around the world in the number of working mothers over the last twenty-five years.<sup>126</sup> Because the United States does not offer much government support for caregivers, including any form of subsidized childcare (in contrast to other countries),<sup>127</sup> a significant burden is placed on family members to provide that care.<sup>128</sup> With workers now bearing the significant burden of caregiving, the Equal Employment Opportunity Commission (“EEOC”) has acknowledged that federal law does not per se create a protected class from workplace discrimination for

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JONES MAG., May–June 1997, at 28 (quoting Hochschild that “women have changed more rapidly than men” so they “are spending more and more time at work, but men are not spending much more time taking care of needs at home (the second shift)”).

<sup>120</sup> Snell, *supra* note 119, at 28.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 30.

<sup>123</sup> See Selmi & Cahn, *supra* note 6, at 13.

<sup>124</sup> *Id.* at 21–22.

<sup>125</sup> See SCHOR, *supra* note 4, at 136; Schultz & Hoffman, *supra* note 5, at 135–36.

<sup>126</sup> Melissa Felder, Note, *Not Quite “Family Friendly”: Amending the Fair Labor Standards Act To Provide Comp Time May Hurt Welfare Leavers and Their Families*, 12 GEO. J. ON POVERTY L. & POL’Y 273, 273 (2005); GORNICK ET AL., *supra* note 85, at 1.

<sup>127</sup> See Michael Selmi & Naomi Cahn, *Caretaking and The Contradictions of Contemporary Policy*, 55 ME. L. REV. 289, 302 (2003) (describing France’s extensive governmental support for childcare); Posting of Sue Schellenbarger to The Juggle, <http://blogs.wsj.com/juggle/2010/01/05/should-the-government-help-provide-child-care/> (Jan. 5, 2010, 01:55 EST) (mentioning Japan’s initiative to expand daycare facilities to support working mothers).

<sup>128</sup> Williams, *The Family-Hostile Corporation*, *supra* note 62, at 922.

caregivers; however, the EEOC still issued a 2007 enforcement guide to help employers understand how other federal anti-discrimination laws may be violated by an employer's mistreatment of workers, who are caregivers.<sup>129</sup> To fill the gap that federal law fails to provide, various states and municipalities have passed laws to provide family caregiver protection in the United States.<sup>130</sup>

While these state laws provide some help for employees by making sure that their efforts to address their roles as caregivers will not affect them adversely at work, more can be done through union negotiations that bridge this caregiver-protection gap and rectify employer failures to offer more family-friendly workplace policies.<sup>131</sup> In a July 2009 study by Jenifer MacGillvary and Netsy Firestein from the University of California Berkeley Institute for Research on Labor and Employment, the researchers concluded that "unionized workers receive more generous family-friendly benefits than their nonunionized counterparts."<sup>132</sup> With respect to paid leave, 46% of unionized workers receive full pay for leave as compared to only 29% of non-union workers.<sup>133</sup> Also, unionized workers are 50% more likely than non-union workers to have paid personal leave to use to care for sick children.<sup>134</sup> Private sector unionized employees are 10% more likely than non-union workers to have some form of leave, including a combination of paid vacation, paid sick leave, paid family leave, and paid personal leave.<sup>135</sup>

Unions also raise wages of unionized workers by nearly 20% and raise total compensation by about 28% as compared to non-union workers.<sup>136</sup> Union workers get 26.6% more vacation and 14.3% more paid time off

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<sup>129</sup> See generally EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>. Some states and municipalities have responded to fill the gap not covered by federal law. See, e.g., Ameet Sachdev, *She Took a Day Off for Sick Child, Got Fired*, CHI. TRIB., Jan. 24, 2010, at C1 (describing an ordinance in Chicago that "is one of the few local statutes nationwide that expressly prohibits job discrimination against parents").

<sup>130</sup> See STEPHANIE BORNSTEIN & ROBERT J. RATHMELL, CTR. FOR WORKLIFE LAW, CAREGIVERS AS A PROTECTED CLASS?: THE GROWTH OF STATE AND LOCAL LAWS PROHIBITING FAMILY RESPONSIBILITIES DISCRIMINATION 1-2, 7-8, tbl.1 (2009), available at <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf> (describing the need for more employee caregiver protection and listing various state laws and municipal ordinances that provide some degree of workplace protection for caregivers).

<sup>131</sup> See JENIFER MACGILLVARY & NETSY FIRESTEIN, U.C. BERKELEY LABOR CTR., FAMILY-FRIENDLY WORKPLACES: DO UNIONS MAKE A DIFFERENCE? 7-8 (2009), available at <http://www.working-families.org/learnmore/pdf/familyfriendly09.pdf>.

<sup>132</sup> *Id.* at 3.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* See also Tony Avirgan, *Unions Guarantee More Vacation*, ECON. POL'Y INST., Aug. 12, 2009, available at [http://www.epi.org/economic\\_snapshots/entry/snapshot\\_20090812/](http://www.epi.org/economic_snapshots/entry/snapshot_20090812/).

<sup>136</sup> LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POLICY INST., BRIEFING PAPER: HOW UNIONS HELP ALL WORKERS 1 (2003), available at <http://www.epi.org/page/-/old/briefingpapers/143/bp143.pdf>.



than non-union workers.<sup>137</sup> Further, in the private sector, 19% of unionized employees, as compared to 10% of non-union employees, receive childcare resources and referral services from their employer.<sup>138</sup> Despite the fact that unions are only involved in a small percentage of the workforce, most studies show that unions play a key role in improving paid leave, wages, and other fringe benefit opportunities for employees.<sup>139</sup>

Imagine the following scenario: a major private sector employer involved in a multibillion-dollar business hires one of its key laborers, represented by a union, pursuant to the terms of a top-level industry-wide employment contract. To cut costs, the owner of the business requires that sixty non-union employees must take a two-week unpaid furlough. This scenario may sound unjust in terms of how the value of union membership may affect workplace dynamics. But this is exactly what happened in early 2009 when the New York Jets, one of thirty-two teams in the National Football League, signed a new player, Bart Scott, to a \$48 million contract.<sup>140</sup> At the same time, the Jets owner, Woody Johnson, ordered sixty non-union employees to take an unpaid furlough for two weeks.<sup>141</sup> Johnson distinguished the two acts by pointing to the collective bargaining agreement, which sets the free agent market for the players as negotiated by the football players' union.<sup>142</sup> Accordingly, union membership allowed Scott to not only avoid the impact of an unpaid furlough, but to also receive millions of dollars in salary as a free agent pursuant to the terms of a collective bargaining agreement.<sup>143</sup>

### III. WHY UNIONS AND EMPLOYEES MUST COLLECTIVELY SCRUTINIZE FOUR-DAY WORK WEEKS VIA UNPAID FURLONGHS

Contrary to the initiatives aimed at making working conditions better for employees through reduced work weeks, many of the more recent proposals from employers do not represent beneficent actions for

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<sup>137</sup> *Id.* at 8.

<sup>138</sup> MACGILLVARY & FIRESTEIN, *supra* note 131, at 4.

<sup>139</sup> See, e.g., MISHEL & WALTERS, *supra* note 136, at 15; Naomi Gerstel & Dan Clawson, *Unions' Responses to Family Concerns*, 48 SOC. PROBS. 277, 292-93 (2001).

<sup>140</sup> Gary Myers, *Woody's Labor Pains, Owner Explains Need for Furloughs*, N.Y. DAILY NEWS, Mar. 24, 2009, at 48.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* For a general discussion of the National Football League ("NFL") collective bargaining agreement ("CBA") and its impact on players' income due to a salary cap and free agency, see Ethan Lock, *The Regulatory Scheme for Player Representatives in the National Football League: The Real Power of Jerry Maguire*, 35 AM. BUS. L.J. 319, 322-28 (1998); Sean W.L. Alford, Comment, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in the Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 230-38 (2009); see also Robert Forbes, Note, *Call on the Field Reversed: How the NFL Players Association Won Big on Salary Forfeiture at the Bargaining Table*, 6 VA. SPORTS & ENT. L.J. 333, 335-39 (2007) (explaining the NFL's salary structure and salary cap as negotiated under the CBA with the players' union).

<sup>143</sup> Myers, *supra* note 140.

employees. These employer-led efforts have developed because of tough economic circumstances and are focused on maximizing savings for employers, not benefitting employees. And when employers take these actions, unions should be concerned about weighing all of the options. If an employer chooses to furlough all of its workers for one day, the cut in pay for lower-wage workers, who may be living from paycheck to paycheck, will have a much more significant impact on those workers even if higher-wage earners are giving up more salary as part of the furlough.<sup>144</sup>

When a reduction in one day's work for mail delivery was recently proposed by the Postmaster General as a way to deal with economic problems, William Burrus, President of the American Postal Workers' Union, objected by saying this change "would stretch to three days when the additional day is combined with Sunday and a Monday holiday. Such delays will drive essential mail to private carriers, who will continue to deliver seven days a week."<sup>145</sup> Accordingly, Burrus's comments suggest that while it may be easy to just pursue fewer work days as a response to tough economic times, a union may want to make sure that an employer has really explored all the consequences of such an action. The union will expect the employer to look for other cost-cutting measures rather than rushing to judgment regarding a reduced day of work.

For example, when the issue of potential furloughs was being contemplated for city workers in Springfield, Illinois, a union representing several city employees, AFSCME Local 3417, developed a series of questions so that the employees could make an informed decision and provide valuable information to the union regarding their views about furloughs in lieu of city layoffs.<sup>146</sup> The survey asked the employees to choose among the following: (1) taking one or more unpaid furlough days; (2) working four nine-hour work days per week (reducing the work week from forty to thirty-six hours); (3) working a nine-day, eight-hour work schedule over two weeks, four days one week and five days the next (also an average of thirty-six hours per week); (4) taking a voluntary layoff of up to thirty days; or (5) not doing any of the above.<sup>147</sup> The city had to bargain with the unions representing its employees because of the existence of

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<sup>144</sup> See Leila Fujimori, *Workers Say Reducing Hours Will Be Painful*, STAR BULL., June 2, 2009, [http://www.starbulletin.com/news/20090602\\_Workers\\_say\\_reducing\\_hours\\_will\\_be\\_painful.html](http://www.starbulletin.com/news/20090602_Workers_say_reducing_hours_will_be_painful.html) (describing differences based upon income and responsibilities of workers due to across-the-board salary reductions through unpaid furloughs); Barbara Hoberock, *Pardon, Parole Workers Protest Day Off*, TULSA WORLD, Oct. 27, 2009, at A1 (describing how an employee who lost five percent of her income per month due to a furlough had to choose between the cost of medication and the cost of propane for her heater).

<sup>145</sup> Joe Davidson, *Five-Day Mail Delivery? Not So Fast*, WASH. POST, Jan. 30, 2009, at D03.

<sup>146</sup> Deana Poole, *Furloughs, Shorter Work Weeks Considered in City Budget Struggle*, ST. J. REG. (Ill.), June 10, 2009, <http://www.sj-r.com/news/x986606765/Furloughs-shorter-work-weeks-considered-in-city-budget-struggle>.

<sup>147</sup> *Id.*

collective bargaining agreements between the unions and the city that prohibited the city from compelling unpaid furloughs.<sup>148</sup>

As part of this process, many of the AFSCME Local 3417 members voluntarily agreed to take more than the three requested furlough days, which resulted in giving up \$82,157 in salary to the city.<sup>149</sup> Another union representing some of the Springfield city workers, AFSCME Local 3738, gave up \$14,144 in salary by volunteering for the furloughs.<sup>150</sup> AFSCME Local 3738 had also decided to take the lead in addressing this issue when it sent a six-page letter to Springfield's mayor,<sup>151</sup> suggesting more than forty other cost-cutting measures that might be employed instead of layoffs and furloughs.<sup>152</sup> The city even agreed that "some of the recommendations are being considered" because they are "forward-looking" and "what we want to do."<sup>153</sup> The exchange and interplay among management, employees, and the employees' union during Springfield's budget crisis demonstrates the efficiencies that can result from a collaborative effort, with unions involved, in such tough economic times.

On the other hand, opportunistic employers realize that if they do not have the collective power to obtain what they desire from their employees, and especially their unions, they can change that dynamic during difficult economic times.<sup>154</sup> Employers will argue that the first thing that becomes a major impediment to revival during tough times is labor costs.<sup>155</sup> And, if a union tries to step up for its members during such times, these collective efforts to support employees in maintaining their wages, benefits, and other hard-fought rights may be touted as selfish acts from entities not aligned with the current economic problems and pain that the unemployed are experiencing.<sup>156</sup> But top management is certainly not feeling the pain of

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<sup>148</sup> Deana Poole, *City Furlough Days Total \$600K in Savings*, ST. J. REG. (Ill.), Nov. 24, 2009, <http://www.sj-r.com/news/x441555127/City-furlough-days-add-up-to-600-000-in-savings>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Letter from Nadine Williams, President of AFSCME 3738, to Timothy J. Davlin, Mayor of Springfield, Ill. (July 3, 2009), available at <http://extras.sj-r.com/pdfs/071709afscmecityletter.pdf>.

<sup>152</sup> Deana Poole, *Union Gives City Hall 40 Money-Saving Ideas*, ST. J. REG. (Ill.), July 19, 2009, <http://www.sj-r.com/local/x135759580/AFSCME-suggests-40-plus-savings-measures-to-city>.

<sup>153</sup> *Id.*

<sup>154</sup> See Robert S. Eshelman, *The Secret War Against American Workers*, MOTHER JONES MAG., Mar. 19, 2009, <http://motherjones.com/politics/2009/03/other-war-workers>; see also Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 480–82 (1993) (describing how unions have value in thwarting opportunistic behavior of employers to appropriate individual wages and other concessions as a whole during difficult times by having a collective focus).

<sup>155</sup> See Wild, *supra* note 14; Union Should Be Thrilled With Furloughs, Not Outraged, [http://weblogs.baltimoresun.com/business/hancock/blog/2009/08/i\\_hope\\_patrick\\_moran\\_maryland.html](http://weblogs.baltimoresun.com/business/hancock/blog/2009/08/i_hope_patrick_moran_maryland.html) (Aug. 26, 2009, 06:00 EST).

<sup>156</sup> See, e.g., Marinucci, *supra* note 20 (describing how hostile public comments and internet chatter affected the union representing Bay Area Rapid Transit employees when it had announced the possibility of a strike).

any unemployment lines.<sup>157</sup> Rather, employers can use the current threat of increasing unemployment to squeeze even more productivity out of workers “in return for lower wages, worse hours, and less benefits.”<sup>158</sup>

When the federal government bailed out the corporate insurance and financial entity American International Group (“AIG”), there was some consternation about the significant salaries and bonuses paid to top executives.<sup>159</sup> These large bonuses were paid and justified as necessary contractual obligations initiated to retain top level executives who could help bring AIG out of its financial mess.<sup>160</sup> Without the promise of enormous salaries, the argument was made that AIG’s financial problems would have been even worse because these executives would not have stayed to help AIG, as many of the executives had foregone other opportunities in reliance on receiving these bonuses.<sup>161</sup>

Compare the AIG example with the debate that occurred regarding Congress’s decision to bail out corporate car manufacturer, General Motors (“GM”). Much of the rhetoric surrounding this decision blamed the United Autoworkers Union (“UAW”) for the financial problems of GM by claiming that inefficient work rules and cost-prohibitive wages made GM unable to compete with foreign non-union car manufacturers.<sup>162</sup> This rhetoric ignored the tremendous number of concessions that the UAW had

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<sup>157</sup> Tom Engelhardt, *The Other War on Workers*, MOTHER JONES MAG., Mar. 19, 2009, available at <http://motherjones.com/politics/2009/03/other-war-workers> (noting that nobody asks lower level employees, like teachers and bus drivers, to stay on during tough times and with lucrative bonuses like AIG did with its top managers); Posting of Cathy Arnst to Business Week Working Parents Blog, [http://www.businessweek.com/careers/workingparents/blog/archives/2009/03/how\\_much\\_would.html?campaign\\_id=rss\\_blog\\_workingparents](http://www.businessweek.com/careers/workingparents/blog/archives/2009/03/how_much_would.html?campaign_id=rss_blog_workingparents) (Mar. 22, 2009) (providing comments of *Business Week* columnist Cathy Arnst who identifies how companies are implementing furloughs and other steps short of a layoff but nothing is happening to top management who “try to take its mistakes out on the hide of the working man”).

<sup>158</sup> Eshelman, *supra* note 154.

<sup>159</sup> See Lynn Doan, *Experts Wade in on Legal Issues; AIG Bonuses*, HARTFORD COURANT, Mar. 19, 2009, at A16.

<sup>160</sup> See Ieva M. Augstums & Stephen Bernard, *AIG Managers in Europe Leave amid Bonus Spat*, ASSOCIATED PRESS, Mar. 26, 2009.

<sup>161</sup> Editorial, *Dear A.I.G., I Quit!*, N.Y. TIMES, Mar. 25, 2009, at A29.

<sup>162</sup> See ROSS EISENBREY, ECON. POLICY INST., Q&A: SETTING THE RECORD STRAIGHT ON GM 2–3 (2009), available at [http://www.epi.org/page/-/pdf/20090603\\_qa\\_gm.pdf](http://www.epi.org/page/-/pdf/20090603_qa_gm.pdf). Eisenbrey explains how UAW work rules with GM do not make it less productive than non-union car makers as studies show several UAW car makers are more productive. *Id.* at 3. Additionally, the UAW wages are not a deterrent and will be even less influential with the newest concessions that reduce wages and benefits greatly. *Id.* One of the biggest problems for GM and U.S. car manufacturers is health insurance, especially for retirees that foreign car manufacturers do not pay in the United States. *Id.* Although the foreign car manufacturers do pay for retiree healthcare coverage in their own countries, it is relatively low as it is also supported by their governments, unlike in the United States. *Id.* See also Lydia Saad, *Unions Second to Auto Execs in Bailout Blame Game*, GALLUP, Dec. 16, 2008, <http://www.gallup.com/poll/113431/Unions-Second-Auto-Execs-Bailout-Blame-Game.aspx> (describing a Gallup Poll where participants placed more blame on unions than Republicans of then-failed legislation to bailout auto companies when Republicans failed to agree to it after demanding more wage concessions from unions that were rejected).

previously given<sup>163</sup> and the additional concessions the UAW eventually provided in order to improve GM's position after its bankruptcy problems in 2009.<sup>164</sup>

Commentator and union leader Bruce Raynor, however, has asserted that foreign non-union car manufacturers had a plan, backed by several conservative southern senators (located in states where non-union car manufacturers operate) to seize upon the opportunity presented by the recession and remove the UAW's hold on the American car manufacturing workplace.<sup>165</sup> When the debate over a financial bailout for the auto industry reached Congress, several Republican senators demanded a huge wage and benefits cut from the UAW as a condition for supporting the bailout bill.<sup>166</sup> When the UAW initially refused to adhere to these demands, Raynor asserted that these southern senators "torpedoed the bill."<sup>167</sup> According to Raynor, however, such scrutiny of wages and benefits did not occur when Congress bailed out the financial industry.<sup>168</sup> In some respects, those foreign non-union car makers may have won. The UAW agreed to bring their labor costs in line with those of non-union car makers, such as Honda and Toyota, as one of the concessions agreed to when the federal government set guidelines for bailing out GM.<sup>169</sup> These examples provide ample concern about the use of tough economic times as an opportunity to circumvent unions and erode any gains in wages and rights that had been attained in the past.

Once employees agree to wage reductions, there is no guarantee that they will ever get those wages back from their employers when the economy improves.<sup>170</sup> As University of Alabama Management Professor Emeritus Trevor Bain has noted, "Once wages are cut, they will come back slowly" and not "until there is an extended market recovery."<sup>171</sup> In fact, future pay increases that occur when the economy improves will more likely be driven by competitive skills rather than compensation to replace reduced pay during the recession.<sup>172</sup> Also, a recent paper by the Economic Policy Institute indicates that even those workers who are "lucky enough"

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<sup>163</sup> See Posting of Gary Chaison to Room for Debate, <http://roomfordebate.blogs.nytimes.com/2009/03/30/gm-and-uaw-the-noose-tightens/> (Mar. 30, 2009, 18:57 EST).

<sup>164</sup> The White House: President Barack Obama, Obama Administration Auto Restructuring Initiative, General Motors Restructuring, [http://www.whitehouse.gov/the\\_press\\_office/Fact-Sheet-on-Obama-Administration-Auto-Restructuring-Initiative-for-General-Motors](http://www.whitehouse.gov/the_press_office/Fact-Sheet-on-Obama-Administration-Auto-Restructuring-Initiative-for-General-Motors) (last visited Apr. 9, 2010).

<sup>165</sup> Bruce Raynor, Op-Ed., *UAW-Busting, Southern Style*, L.A. TIMES, Dec. 18, 2008, <http://articles.latimes.com/2008/dec/18/opinion/oe-raynor18>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Chris Isidore, *GM, UAW Reach Cost-Cutting Deal*, CNN MONEY, Jan. 28, 2009, [http://money.cnn.com/2009/01/28/news/companies/gm\\_uaw\\_jobsbank/](http://money.cnn.com/2009/01/28/news/companies/gm_uaw_jobsbank/).

<sup>170</sup> Rupinski, *supra* note 59.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

to have kept their jobs in 2009 have faced a significant diminution in their wage growth.<sup>173</sup> Additionally, employers have increasingly attempted to curtail expenses by reducing or eliminating contributions to retirement plans and implementing unpaid furloughs that represent a two percent annual reduction in wages for every week furloughed.<sup>174</sup> Accordingly, when asked to negotiate the prospect of reduced wages from a shorter work week or an unpaid furlough in lieu of layoffs, unions must factor in the loss of wages that will likely never be recovered<sup>175</sup> and the long-term impact on hard-fought benefits.

#### IV. COLLECTIVE UNION AND LEGISLATIVE RESPONSES TO FURLONGHS: MANDATING MORE PAID LEAVE INSTEAD OF REDUCED WORK HOURS

##### A. *Shorter Hours Without Pay Does Not Work for Most Employees*

Several work/family scholars have developed proposals that tend to focus on trading time off for less pay, which is only an option for workers who can afford to make the trade-off.<sup>176</sup> These proposals operate contrary to the needs of many underemployed workers who seek more, not fewer, hours of work.<sup>177</sup> Accordingly, Michael Selmi and Naomi Cahn have asserted that work/family scholars should not look at changes that reduce hours of work, but should focus on policies that allow more work as needed:

[T]he real objection to shorter workweek proposals is that, in the context of today's economy, within the United States such a proposal seems utterly unrealistic. . . . [T]here can be little objection to a shorter workweek that does not entail a reduction in pay. Yet, . . . it seems even more unlikely that we might adopt a shorter workweek that includes no cut in salary, which would effectively impose a national wage increase of 12% across the board. And . . . if workers were asked to choose whether they wanted to work fewer hours for less money, all indications are that a majority of workers would not be willing to do so.<sup>178</sup>

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<sup>173</sup> LAWRENCE MISHLE ET AL., ECON. POLICY INST., THE RECESSION'S HIDDEN COSTS, WORKERS LUCKY ENOUGH TO KEEP THEIR JOBS STILL FEEL THE PAIN IN THEIR PAYCHECK 1, 6 (2009), available at [http://epi.3cdn.net/954e0802653119c2e8\\_35m6b9poo.pdf](http://epi.3cdn.net/954e0802653119c2e8_35m6b9poo.pdf).

<sup>174</sup> *Id.* at 1, 6–7.

<sup>175</sup> See Coy et al., *supra* note 12 (noting that “[e]ven 15 years out of school, people who graduated from college in a recession earn 2.5% less than if they had graduated in more prosperous times”).

<sup>176</sup> See Selmi & Cahn, *supra* note 6, at 8 (criticizing this focus as being unrealistic in neglecting the needs of women who are lower-wage earners).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 21–22.

Therefore, any proposals that focus on a reduction in hours of work via a shorter work week, either with less pay or even the same pay, do not present the best long-term option for addressing issues for overworked, underemployed, or unemployed workers.

*B. Family-Specific Policies Can Generate Stigma and May Lack Interest*

Even when employers have provided progressive family-friendly policies, those flexible working arrangements have presented concerns when their managers and employees failed to support these policies, leaving the employees who choose these benefits to be treated as second-class citizens.<sup>179</sup> Such a stigma can create an issue for men and women in the workplace who are perceived to lack ambition if they choose to use any family-friendly policies that give them time off from work.<sup>180</sup> In January 2009, the accounting firm KPMG, in an effort to save labor costs and retain valued employees, introduced an initiative called “Flexible Futures.”<sup>181</sup> This initiative offered the 11,000 professional employees at “KPMG’s British operations the following options: They could go to a four-day workweek and take a 20 percent pay cut; they could opt for a mini-sabbatical at 30 percent base pay; they could opt for both of the above; or they could stick with their current arrangement.”<sup>182</sup> The program was considered a success because eighty percent of the eligible employees took one of the flexible options, and, more importantly, KPMG was able to “achieve its goal of retaining jobs while cutting costs.”<sup>183</sup>

Sylvia Ann Hewlett, an economist and founder of the Center for Work-Life Policy, believes that KPMG acted wisely in structuring its initiative to offer “shorter workweeks and mini-sabbaticals as a strategic response to the downturn,” as opposed to creating any potentially gendered stigma by offering benefits to aid working mothers.<sup>184</sup> Accordingly, a win-win result occurred as overworked men and women were both able to take advantage of the flexible time and save their jobs, while KPMG was able to keep good workers and also reduce labor costs.<sup>185</sup>

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<sup>179</sup> See Dau-Schmidt & Brun, *supra* note 72, at 191; Schultz, *supra* note 21, at 1936–37; Williams, *The Family-Hostile Corporation*, *supra* note 62, at 924.

<sup>180</sup> See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND, WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 115, 117–18 (1997) (discussing a male employee who was teased by male workers who did not understand why a man would use the company’s paternity policy to take an unpaid vacation); see also Arlie Russell Hochschild, Editorial, *A Work Issue That Won’t Go Away*, N.Y. TIMES, Sept. 7, 1998, at A17 (“Most companies still discourage workers from taking advantage of flex time, job sharing, maternity and paternity leave, or part-time work—or they have a corporate culture that rewards workers more for the time they put in than for what they accomplish.”).

<sup>181</sup> Sylvia Ann Hewlett, *Making Flex Time a Win-Win*, N.Y. TIMES, Dec. 13, 2009, at BU13.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; About CWLP: Sylvia Ann Hewlett, <http://www.worklifepolicy.org/index.php/pageID/23> (last visited Apr. 23, 2010).

<sup>185</sup> Hewlett, *supra* note 181.

But even absent stigma, employees may not necessarily avail themselves of such broad-based and employer-supported family-friendly policies, despite their family needs. The realities of the Protestant work ethic that “devalues leisure” and permeates the U.S. culture may overcome any interest in policies that are focused on time off for general family pursuits.<sup>186</sup> Employers, as part of a free enterprise system focused on maximizing wealth and delivering profits, will value an employee who adopts this Protestant work ethic because that employee will “work more and relax less” in performing a job.<sup>187</sup> Employees working for these employers will view their adoption of the Protestant work ethic as a method to receive more income and favors from their employers, resulting in more material wealth.<sup>188</sup>

Therefore, a family-friendly approach that pursues fewer hours of work to encourage family pursuits may not have much value. When there are opportunities to get more material wealth by increasing hourly compensation or by having benefits doled out with respect to more face time, working fewer hours contradicts those objectives. This search for more material wealth is all-encompassing in American society as too many workers get caught up in what Professor Richard Delgado refers to as the “myth of upward mobility.”<sup>189</sup> Even when faced with the option of working less, the dynamics of this work ethic and desire for upward mobility may lead employees to work more because they either follow the herd or do not understand the values of working less.<sup>190</sup>

Accordingly, it is unwise to assume that an individual, overworked American employee, when given the choice, will actually work less to enjoy more family and personal pursuits.<sup>191</sup> Societal notions of living the

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<sup>186</sup> Robert Cooter, *Models of Morality in Law and Economics*, 78 B.U. L. REV. 903, 924 (1998).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 883–85 (2007) (reviewing MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS* (2005) and CHARLES MURRAY, *IN OUR HANDS* (2006)) (noting the “middle class’s fear of falling” and the prominence of the self-made man in American culture). See also Williams, *The Family-Hostile Corporation*, *supra* note 62, at 927–28 (suggesting that a masculine culture in the American corporate workplace is what makes us work long hours); Paul Krugman, Editorial, *Losing Our Country*, N.Y. TIMES, June 10, 2005, at A21 (complaining that the loss of middle-class status has become an increasing fear); Louis Uchitelle, *Were the Good Old Days that Good?*, N.Y. TIMES, July 3, 2005, at BU1 (discussing deteriorating living standards, including life expectancy, public services, infant mortality, obesity, and job security for many Americans).

<sup>190</sup> See Richard H. McAdams, *Modeling Morality: What Are the Limits to Self-Directed Preference Change?*, 78 B.U. L. REV. 947, 958–59 (1998) (suggesting two reasons why workers may still choose the Protestant work ethic, which values production and devalues leisure: (1) costs of imperfect information about the values of leisure versus work; and (2) collective action problems that result from a rat race mentality of trying to keep up with and compare one’s relative wealth with that of others). But see Williams, *The Family-Hostile Corporation*, *supra* note 62, at 930 (suggesting that it is not a Protestant work ethic that makes American employees such work addicts, but it is more due to our immigrant culture that is inspired by the desire to “work hard and get ahead”).

<sup>191</sup> See Snell, *supra* note 119, at 28.



"American dream" encourage workers with humble means to aspire to the greatest riches in our society if they just continue to put their noses to the grindstone and work harder than all others around them.<sup>192</sup> Richard Delgado, however, has also found that "the extent to which poor individuals are able to work their way up the ladder" does not match American society's romantic notions of moving up, given that "the United States has one of the lowest rates of upward mobility in the developed world."<sup>193</sup> The reality is that "few citizens leave the class into which they are born for a higher one."<sup>194</sup> Nevertheless, American workers seeking "the dream" will view themselves in an individual competitive position with other workers.<sup>195</sup> In accepting this competition, American workers will try to work more because the culture expects them to do so in order to get ahead and they assume that they will receive compensation for doing so.<sup>196</sup> At a minimum, the assumption that American workers have a cultural resistance to working more hours may be inaccurate.<sup>197</sup> Therefore, collective and societal intervention through legislative action or union representation presents the best options to remedy the problems of the overworked, unemployed, and underemployed in the United States.<sup>198</sup>

### *C. Pursuing Mandatory Paid Leave and Vacation Provides the Best Option*

For the underemployed, unemployed, and overworked in the United States, the best option for addressing their needs would be the pursuit of mandatory paid leave and vacation. Unions have consistently provided better benefits, including paid leave and paid vacations for their

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<sup>192</sup> See McAdams, *supra* note 190, at 958–59; Note, *Finding a Place for the Jobless in Discrimination Theory*, 110 HARV. L. REV. 1609, 1610–14 (1997). But see Hari, *supra* note 4 ("True wealth lies not only in having enough, but in having the time to enjoy it.").

<sup>193</sup> Delgado, *supra* note 189, at 900–01.

<sup>194</sup> *Id.* at 901.

<sup>195</sup> See Hari, *supra* note 4 (finding that although American workers want more time off, we get "locked in an arms race with our colleagues" and fear that if they "relax and become more human" they will "fall behind the person in the next booth down, who is chasing faster").

<sup>196</sup> See Baldas, *supra* note 48.

Employers think that if you're doing things like listening to voicemails [or reviewing e-mails or policies, that that's not really work. However, the courts are not really going to agree with this . . . . You may have a group of employees that say, "On the one hand, there may be a policy that says we're not supposed to work," . . . but on the other hand, there's a culture that expects certain work to be done.

*Id.* (quoting Chicago-based attorney Brian Jackson); Selmi & Cahn, *supra* note 6, at 12 (finding that "most workers are unwilling, and unable, to trade income for fewer hours").

<sup>197</sup> Snell, *supra* note 119, at 28.

<sup>198</sup> See SCHOR, *supra* note 4, at 136 (describing the need for intervention when parties are destined to repeat behavior that has negative social consequences, but may be viewed on an individual basis as beneficial); Schultz, *supra* note 21, at 1937 (asserting that workers need "collective policy solutions" and "universal structural solutions" that are not limited to "parenting or other family demands").

employees.<sup>199</sup> Therefore, the value of unions and union representation would suggest a collective approach to solidarity for workers that centers on providing paid leave. A legislative response, albeit a more challenging option, would also be necessary given the number of workers not represented by unions.<sup>200</sup> Furthermore, statutes that mandate paid leave and vacation would not have the stigma that occurs with hours-based or specific family-focused leave. Even though employees may want to work more, not less, as part of the Protestant work ethic, requiring paid leave would be consistent with pursuits of material wealth because it is still paid. For union-represented workers, their unions can work to establish these benefits through collective bargaining.

Because the FMLA only protects unpaid family and medical leave for an employee's return to work for up to twelve weeks, several commentators have called for paid family, sick, and vacation leave laws.<sup>201</sup> Also, several pieces of legislation have been proposed in the 111th Congress to address family-friendly and employee-friendly matters, including issues related to paid family and medical leave and paid sick and vacation days. A review of these pending bills offers some understanding of the possible legislative response that may offer the best solution to addressing current work problems for employees, especially given the jobs focus for 2010.

The Working Families Flexibility Act seeks to give employees the statutory right to request flexible work terms and conditions, as well as to ensure that employers consider these requests.<sup>202</sup> An employee may request a change in terms or conditions if the change relates to the number of hours the employee is required to work, the times when the employee is required to work, or the place of work.<sup>203</sup> After the employee submits a request, the employer must hold a meeting with the employee within fourteen days of the submission, and the employer must provide a written answer no more than fourteen days after the meeting.<sup>204</sup>

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<sup>199</sup> MISHEL & WALTERS, *supra* note 136, at 1–2; Gerstel & Clawson, *supra* note 139, at 278, 286; Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 767 & n.221 (2000).

<sup>200</sup> See Coy et al., *supra* note 12 (noting that “while unions covered 36% of private-sector workers in 1953, the figure plunged to less than 8% by 2008”).

<sup>201</sup> See Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293, 311–14 (2007); Dau-Schmidt & Brun, *supra* note 72, at 192; Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 37–41 (2005); Schor, *supra* note 72, at 171; Selmi, *supra* note 199, at 763, 770–71; Selmi & Cahn, *supra* note 6, at 22–23; see also Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 381–82 (1996) (noting that, in Sweden, paid parental leave has enabled the country to maintain the world's highest labor market participation rate among women and that employers strongly approve of the policy because it has increased employee productivity).

<sup>202</sup> Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009).

<sup>203</sup> *Id.* § 3(a).

<sup>204</sup> *Id.* § 4(b)(1)(A)–(B). For further discussion on the Working Families Flexibility Act appearing in this Symposium Issue, see Rachel Arnow-Richman, *Incenting Flexibility: The*

The 111th Congress also introduced the Paid Vacation Act of 2009 with the goal of seeking to amend the FLSA to require employers with 100 employees or more to provide at least one week of paid vacation leave per year to employees with a minimum of one year of service.<sup>205</sup> According to the findings of this proposed legislation, job-related stress is becoming an increasing problem in this country, and the United States is the only industrialized nation without a minimum annual leave policy.<sup>206</sup> Job-related stress costs \$344 billion per year in absenteeism, lost productivity, and related healthcare costs.<sup>207</sup> Vacations can help alleviate some of the problems and costs associated with burnout at work.<sup>208</sup> If passed, this “would be the first broadly applied . . . vacation law” in the United States.<sup>209</sup>

The Healthy Families Act was introduced to provide employees with paid time off to meet their own healthcare needs and those of their family—including children, parents, in-laws, and other family members they care for.<sup>210</sup> The proposed legislation notes that routine medical care reduces healthcare costs by treating illness early and thus increases productivity.<sup>211</sup> Another policy behind this proposed legislation is to minimize discrimination on the basis of sex by ensuring that paid sick-time is available for caretaking reasons on a gender-neutral basis.<sup>212</sup> Paid sick days that can be used to address the effects of domestic violence are also needed according to this proposed legislation.<sup>213</sup> Aside from benefitting the employee, statistics show that providing assistance to an abused employee benefits a company’s financial performance because employers can retain workers who might otherwise be compelled to leave.<sup>214</sup>

The Family Leave Insurance Act of 2009 was introduced to address the needs of employees who are eligible to take leave under the FMLA but who cannot afford to do so because FMLA leave is unpaid.<sup>215</sup> A FMLA survey by the Center for Women and Work at Rutgers University suggests that employees suffer severe financial hardships as a result of caring for ill family members.<sup>216</sup> Another study by Harvard University found that forty-nine percent of foreclosures were caused, at least in part, by a family

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*Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108–12 (2010).

<sup>205</sup> Paid Vacation Act of 2009, H.R. 2564, 111th Cong. § 3 (2009).

<sup>206</sup> *Id.* § 2(4).

<sup>207</sup> *Id.* § 2(2).

<sup>208</sup> *Id.* § 2(12).

<sup>209</sup> Avirgan, *supra* note 135.

<sup>210</sup> Healthy Families Act, H.R. 2460, 111th Cong. § 2(1) (2009).

<sup>211</sup> *Id.* § 2(2)–(3), (7), (9).

<sup>212</sup> *Id.* § 3(5)(A).

<sup>213</sup> *Id.* § 3(3).

<sup>214</sup> *Id.* § 2(22).

<sup>215</sup> Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. § 2(1) (2009).

<sup>216</sup> *Id.* § 2(2).

medical crisis.<sup>217</sup> By providing care for family members, American workers “prevent the worsening of illnesses and promote [a] strong recovery.”<sup>218</sup> Medical leave benefits that support these caregivers also provide value for businesses by increasing employee retention and productivity.<sup>219</sup>

The Family and Medical Leave Enhancement Act of 2009 was introduced to amend the FMLA to allow employees to take additional leave for parental involvement in their children’s or grandchildren’s educational and extracurricular activities.<sup>220</sup> The bill also seeks “to clarify that leave may be taken for routine family medical needs and to assist elderly relatives, and for other purposes.”<sup>221</sup> The Domestic Violence Leave Act was created to amend the FMLA to allow leave to address domestic violence, sexual abuse, and their effects.<sup>222</sup> This proposed legislation also extends coverage under the FMLA to domestic partners.<sup>223</sup> The Family and Medical Leave Inclusion Act was introduced to amend the FMLA “to permit leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent.”<sup>224</sup>

The Family-Friendly Workplace Act, also introduced by the 111th Congress, attempts to address purported family-friendly employee issues by amending the FLSA to allow employers to give employees compensatory time off in lieu of overtime compensation.<sup>225</sup> An employee would have to enter into an agreement with the employer knowingly and willingly, and not as a condition of employment, in order for the employer to substitute time off for monetary overtime compensation.<sup>226</sup> The particular policy of prohibiting compensatory time off in the private sector has been the source of an ongoing debate between economists and advocates asserting that compensatory time off policies merely make it more likely that employers will overwork employees covered by the FLSA.<sup>227</sup> If one purpose of the FLSA’s forty-hour work week requirement

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<sup>217</sup> *Id.* § 2(6).

<sup>218</sup> *Id.* § 2(3).

<sup>219</sup> *Id.* § 2(5).

<sup>220</sup> Family and Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong. (2009).

<sup>221</sup> *Id.*

<sup>222</sup> Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009).

<sup>223</sup> *Id.*

<sup>224</sup> Family and Medical Leave Inclusion Act, H.R. 2132, 111th Cong. (2009).

<sup>225</sup> Family-Friendly Workplace Act, H.R. 933, 111th Cong. § 2 (2009).

<sup>226</sup> *Id.* As an aside, and given the difficulties in obtaining bipartisan support for legislation, it should be noted that this proposed legislation was the only one addressing the issues herein that was offered within the 111th Congress by a Republican, and it had only Republican co-sponsors. *Id.*

<sup>227</sup> See Nicholas Clark, *Fair Labor Standards Act Reform—It’s Not Broke, So Don’t Fix It*, 11 LAB. LAW. 343, 351 (1996) (arguing that then-proposed Republican FLSA reforms, including provisions for compensatory time off, “are regressive attempts to eliminate the forty hour week as the standard for the vast majority of working Americans”); Shawn D. Vance, *Trying To Give Private Sector Employees a Break: Congress’s Efforts To Amend the Fair Labor Standards Act*, 19 HOFSTRA LAB. & EMP. L.J. 311, 321–22 (2002) (asserting that employees want to make sure they, not employers,

is to give employers an incentive to not overwork employees beyond that requirement, then allowing compensatory time off contradicts that purpose.<sup>228</sup> As a result, several attempts to pass similar bills have failed.<sup>229</sup> Even when one of the prior bills was supported by a Democratic President, ongoing concerns about how employers might abuse the right to use compensatory time off to make employees work longer prevented any action on the proposed legislation.<sup>230</sup> Distrust of employers by employees and unions plays a major role here.<sup>231</sup> If bosses can encourage their employees to work more without actually having to pay overtime through using compensatory time off in the private sector, the policy of the FLSA to discourage overtime is circumvented.<sup>232</sup> One of the most important concerns about such legislation, however, is that it may also continue an employer's past practices of failing to provide paid leave for employees.<sup>233</sup>

Near the end of 2009, one additional piece of legislation was offered to Congress: the Emergency Influenza Containment Act.<sup>234</sup> Approximately "[t]ens of millions" of "private-sector workers[] do not receive paid sick

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have control over using compensatory time off in lieu of overtime pay); David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?* 20 BERKELEY J. EMP. & LAB. L. 74, 88–90 (1999) (discussing the entities involved on both sides of the debate regarding compensatory time off as an amendment to the FLSA for private sector workers); Lonnie Golden, *Comp Time Bills Off Target*, ECON. POL'Y INST., Apr. 17, 2003, available at [http://www.epi.org/publications/entry/briefingpapers\\_comp/](http://www.epi.org/publications/entry/briefingpapers_comp/) (arguing that legislative proposals to legalize the replacement of overtime pay with compensatory time off are "likely to prove counterproductive," and that the focus should instead be on reducing the hours of employees who prefer shorter working times); Lonnie Golden, *Work-Flex Bills Don't Help the Workers*, ECON. POL'Y INST., June 24, 2003, available at [http://www.epi.org/publications/entry/webfeatures\\_viewpoints\\_work\\_flex\\_bills/](http://www.epi.org/publications/entry/webfeatures_viewpoints_work_flex_bills/) (arguing that bills such as the Family Time Flexibility Act and the Family Time and Workplace Flexibility Act "would do nothing to ease the inflexibility of the modern workplace and its squeeze on family time"); Ross Eisenbrey, Op-Ed., *Another Way for Business To Abuse Workers*, ECON. POL'Y INST., Aug. 4, 2006, available at [http://www.epi.org/publications/entry/webfeatures\\_viewpoints\\_comp\\_time/](http://www.epi.org/publications/entry/webfeatures_viewpoints_comp_time/) (maintaining that a 2003 compensatory time bill would give employers the incentive to increase the work week of employees).

<sup>228</sup> See Liebig, *supra* note 98, at 513 (discussing how compensation systems that provide for payment by methods other than cash for hours of work can undermine the national work hours standard); Vance, *supra* note 227, at 321–23 (discussing how proposed changes to the FLSA could compel employees to work more than forty hours per week).

<sup>229</sup> See Felder, *supra* note 126, at 273.

<sup>230</sup> See *FLSA: Clinton's Comp-Time Proposal Fails To Win Labor or Business Converts*, Daily Lab. Rep. (BNA) No. 61, at D-22 (Mar. 31, 1997) (identifying proposed comp time legislation in 1997 that was introduced by Republicans and endorsed by the Clinton administration with proposed changes that would allow twenty-four hours of unpaid leave a year to care for family matters such as school functions). While business representatives applauded Republican leaders for introducing comp time legislation and making it a top priority, they could not support the extension of the FMLA component. *Id.* On the other hand, Democrats and union officials could not support compensatory time off as a family-friendly measure because it would reduce overtime pay and allow employers to coerce employees into accepting comp time and lost pay with little enforcement opportunities to protect against such coercion. *Id.*

<sup>231</sup> See Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. L.J. 465, 486 n.65 (1997).

<sup>232</sup> See Walsh, *supra* note 227, at 87–88.

<sup>233</sup> *Id.* at 98–99.

<sup>234</sup> The Emergency Influenza Containment Act, H.R. 3991, 111th Cong. (2009).

days, and as a result many of them cannot afford to stay home when they are ill.”<sup>235</sup> The new legislation would allow employees working for businesses with at least fifteen employees to be guaranteed five paid sick days if their employers sent them home or advised them to stay home or go home.<sup>236</sup> One would think that with growing health epidemics, including recent outbreaks of H1N1, employers would be supportive of legislation mandating paid sick days to make sure that workers do not feel they have to come to work when sick. Most indicators suggest that employers are not handling these health epidemic matters very well.<sup>237</sup> Nevertheless, business groups oppose such legislation for imposing expensive burdens on employers and argue that these matters are better left in the hands of individual employers to address as they arise in particular workplaces.<sup>238</sup> Accordingly, it is unlikely that employers will rally around this legislation or any form of paid leave.<sup>239</sup>

On the other hand, when there are actions by employers that the law currently does not address, and those actions have a substantial impact on certain work groups, change must occur.<sup>240</sup> When employers face “economic adversity” and respond to it by deciding to cut vacation pay and other fringe benefits, employees will unlikely have any protection from these decisions, even if such cuts have adverse effects on certain work groups.<sup>241</sup> By legally requiring paid days off, employers will have to act in a way that will break the cycle of problems for the overworked and the underemployed who find themselves needing time off for health, family, and personal matters, but cannot afford it. This provides a benefit that complements family and medical leave under the FMLA and minimum wages and overtime under the FLSA that employers cannot easily take

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<sup>235</sup> Steven Greenhouse, *At Work with the Flu*, N.Y. TIMES, Nov. 3, 2009, at B1.

<sup>236</sup> Steven Greenhouse, *House Bill Would Assure Workers Paid Sick Days*, N.Y. TIMES, Nov. 4, 2009, at B3.

<sup>237</sup> Greenhouse, *At Work with the Flu*, *supra* note 235.

<sup>238</sup> *See id.*

<sup>239</sup> Greenhouse, *House Bill*, *supra* note 236. *See also* Orly Lobel, *Book Review: The Law of Social Time*, 76 TEMPLE L. REV. 357, 363 (2003) (reviewing RAKOFF, *supra* note 72) (“Limitations on commercial activities and employment relations are increasingly perceived as disruptive of a free and competitive market in today’s economic realities.”).

<sup>240</sup> *See* SCHOR, *supra* note 4, at 136 (asserting that when vicious economic cycles exist where employers and employees continue to operate a certain way because it is to their individual advantage, despite the societal harm, nothing will defeat such “Prisoner’s Dilemmas” without “intervention on a social level—from government, unions, professional associations, and other collective organizations”); Gelbach et al., *supra* note 113, at 816–19, 833, 836–38 (describing employer preferences for providing certain race, gender, and religious groups with fringe benefits in lieu of pay and how disparate impact discrimination law currently fails to prevent employers from offering such benefits, even though they may affect these work groups differently).

<sup>241</sup> *See* Gelbach et al., *supra* note 113, at 837 (discussing comments by Judge Richard Posner in *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1163–65 (7th Cir. 1992), finding that across-the-board cuts in vacation time, along with other fringe benefits and salary, were not discrimination because they were “necessitated by business downturns” and occurred as “an unavoidable response to adversity”).

away during tough times. These issues become magnified when those tough times may have arisen as a result of poor management rather than high labor costs.<sup>242</sup>

Collective employee support should be focused on getting Congress to amend the FMLA and FLSA so that employers will be obligated to provide employees with paid leave and paid vacation. Out of all the pending legislation, if Congress passed the Healthy Families Act<sup>243</sup> and the Paid Vacation Act of 2009,<sup>244</sup> these measures would provide for the greatest need of workers, who would have paid vacation and time to take care of their families. Further, by passing this legislation, Congress would add protections for caregivers beyond what may be allowed under the current state laws and various ordinances that address this issue.<sup>245</sup>

Even if Congress finds it challenging to reach a consensus on these issues, it should at least agree to make one change by allowing paid sick leave under the bill that is currently pending to protect workers with paid leave during a health epidemic, the Emergency Influenza Containment Act.<sup>246</sup> Passing this legislation could provide the first step in giving paid leave as long-term aid to American workers who need more paid time off. Whether Congress will be able to address the broader and more systematic concerns regarding overworked and underemployed workers in the United States by modeling the successes of other countries that guarantee more paid time off for vacation and sick leave remains an unanswered question.

Nevertheless, in the short-term, to address the issues of unemployment and underemployment that affect a significant number of individuals, Congress should adopt policies that nurture the work-sharing unemployment programs that allow states to support employers who want to keep their employees.<sup>247</sup> By giving assistance to the states to fund such programs, and making the law clearer so that other states can adopt it or follow a federal law such as the pending Keep Americans Working Act,<sup>248</sup> a short-term solution would be provided to address the current unemployment and underemployment problems.<sup>249</sup> Congress must, however, mandate more paid leave so that workers have more paid time off

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<sup>242</sup> See Ortiz, *supra* note 13 (describing concerns about the possibility that poor management had caused the financial problems that resulted in furloughs and concerns about breakdowns in communication between California workers and Governor Schwarzenegger in their furlough dispute).

<sup>243</sup> Healthy Families Act, H.R. 2460, 111th Cong. (2009).

<sup>244</sup> Paid Vacation Act of 2009, H.R. 2564, 111th Cong. (2009).

<sup>245</sup> See Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 31–36 (describing a patchwork of laws related to protecting caregivers and how they are inefficient at providing sufficient protection).

<sup>246</sup> The Emergency Influenza Containment Act, H.R. 3991, 111th Cong. § 3 (2009).

<sup>247</sup> RIDLEY, *supra* note 45, at 2–3.

<sup>248</sup> Keep Americans Working Act, S. 1646 111th Cong. (2009). This bill would provide financial assistance to state unemployment programs to support work-sharing programs for two years. *Id.* § 2.

<sup>249</sup> See RIDLEY, *supra* note 45, at 3; Pugh, *supra* note 45.

for vacation, sick leave, and to care for their families and their personal lives. These actions would help improve American workers' productivity in the long-term, especially when issues regarding worker retention have become magnified by current economic struggles.

#### V. CONCLUSION: TOUGH TIMES CALL FOR WAGE-HOUR IMPROVEMENTS INSTEAD OF OPPORTUNISTIC EMPLOYER BEHAVIOR THAT REDUCES WORKERS' ECONOMIC RIGHTS

As Professor James Pope has recently recognized, "workers collectively cutting their hours to prevent layoffs is a time-honored tradition of labor solidarity."<sup>250</sup> The "selflessness of workers" in taking such actions, as President Obama referred to during his inauguration, reflects the power of collective choice by employees, not employer-forced actions.<sup>251</sup> As more details come to light about the growing number of unpaid furlough decisions, however, especially those adopted unilaterally, employees must collectively develop long-term responses to these furlough initiatives.<sup>252</sup> Most of the recent lawsuits involving challenges to furloughs should help explain that if there is a union in place, employers should

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<sup>250</sup> James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 655 (2009).

<sup>251</sup> See Obama, *supra* note 1.

<sup>252</sup> As an example, near the end of 2008, California Governor Arnold Schwarzenegger initially sought unpaid furloughs for California employees to stem the economic tide and pursued them without union agreement due to emergency circumstances. Karl Vick, *Calif. Budget Crisis Has a Familiar Ring*, WASH. POST, Dec. 24, 2008, at A03. When Governor Schwarzenegger ordered the furloughs in December 2008 to begin in February 2009, he made this decision unilaterally based on his belief that he was authorized to do so because they were necessary in order to deal with a budget emergency. Press Release, Office of the Governor, Gov. Schwarzenegger Issues Executive Order to Address Worsening Budget Crisis Through State's Payroll (Dec. 19, 2009), available at <http://gov.ca.gov/press-release/11309>. See also *Judge Blocks Furloughs in California*, N.Y. TIMES, Dec. 31, 2009, at A20; Richard Borreca, *Furlough Fight Brews*, STAR BULL., June 2, 2009, [http://www.starbulletin.com/news/20090602\\_Furlough\\_fight\\_brews.html](http://www.starbulletin.com/news/20090602_Furlough_fight_brews.html) (discussing similar acts by Governor Lingle in Hawaii, who implemented furloughs without union approval). Governor Schwarzenegger, similar to government officials in Hawaii, Washington, and Maryland, implemented these unpaid furloughs without the agreement of the union and the employees, and legal challenges have stymied those unpaid furlough actions. See, e.g., Tresa Baldas, *Another Furlough Plan Bites the Dust*, NAT'L L.J., Sept. 1, 2009, <http://www.law.com/jsp/article.jsp?id=1202433532700&rss>; Shane Goldmacher, *Prison Guard Furloughs Illegal*, L.A. TIMES, Dec. 18, 2009, at A7; Jonathan Mummolo & Maria Glod, *Unions Buoyed by Rejection of Pr. George's Furloughs*, WASH. POST, Aug. 20, 2009, at B1; Posting of Chris Grygiel to Strange Bedfellows, <http://blog.seattlepi.com/seattlepolitics/archives/180796.asp> (Oct. 1, 2009, 15:45 PST). Felix De La Torre, an attorney from the SEIU (the union involved in a number of the court cases in California challenging Schwarzenegger's furlough actions), has argued that "[f]urloughs should be used only as a last resort" and that "in California, they're being misused because it isn't the last resort" given that Schwarzenegger does not want to make "difficult political choices." Baldas, *supra*. These SEIU court actions have not deterred Governor Schwarzenegger, who has already "hinted" that more furloughs may be necessary in 2010. Randal C. Archibold, *Schwarzenegger Pressures U.S. for More Aid for Needy California*, N.Y. TIMES, Dec. 23, 2009, at A12. Whether Governor Schwarzenegger will pursue those furloughs through a collective process or will view the decision to furlough as a unilateral action for him to make remains to be seen.



negotiate with that union and gather the collective input of the employees, rather than unilaterally impose a furlough.<sup>253</sup>

These concerns become even more prevalent during economic downturns when employees' economic interests are extremely vulnerable.<sup>254</sup> Employers could certainly seize upon the vulnerability of employees and unions in this dire economic setting and impose systemic changes regarding wages and hours of work.<sup>255</sup> With the unemployment problems that have beset the United States in 2008 and 2009, unions and employees need to be more vigilant in providing a check on employer overreaching in 2010. No matter how alluring the prospect of a shorter work week without pay via a furlough may seem when compared to layoffs, unions and employees must pursue all available avenues of relief before employers take any extreme measures such as layoffs or unpaid furloughs. Employees and their unions should not forget that their collective solidarity comes with a cost when employers implement furloughs or initiatives to reduce the work week for less pay. Employers choose these furloughs because of the financial benefits they value, regardless of how compassionate it may appear to not lay off employees. As President Obama noticed, the real compassion comes from those workers who choose to help fellow workers stay employed by reducing their own wages and hours of work. That collective action, however, must also be considered in light of the family-friendly benefits and the long-term effect on wages and other conditions of employment that may arise.

Any collective employee proposal that focuses on reducing work hours in the work week as a long-term approach will run into obstacles unless it results in a reduction in wages, which neither employees nor their unions desire. Wages may still be reduced as a viable bargaining chip through a temporary furlough, especially when unemployment work sharing applies. Employees and unions, if present, should seek paid family leave and paid vacation as a response, either by statutory mandate or union-negotiated collective bargaining agreements. Several pieces of pending legislation, including the Healthy Families Act, the Paid Vacation Act of 2009, and the

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<sup>253</sup> Tresa Baldas, *Have Contract, Can't Furlough*, NAT'L L.J., Aug. 31, 2009, <http://www.law.com/jsp/article.jsp?id=1202433462923>.

<sup>254</sup> This vulnerability is evidenced by growing antagonism felt by the unemployed toward California state workers who, despite being subjected to unpaid furloughs, still have their jobs. *Little Sympathy in Private Sector for Furloughs*, CBS-13, Feb. 7, 2009, <http://cbs13.com/local/furloughs.private.sector.2.929523.html>. Union spokesman Jim Zamora has attempted to redirect that antagonism, commenting that while "union members were glad to have jobs" and realize "the seriousness of the economic situation in California, the nation and the entire world," Governor Schwarzenegger "should have negotiated alternatives" with the union instead of creating "self-inflicted damage" with a unilaterally-imposed order to implement unpaid furloughs that trimmed state workers' salaries by 9.2%. *Id.* See also *Union Should Be Thrilled with Furloughs, Not Outraged*, *supra* note 155; Marinucci, *supra* note 20; Steve Raabe, *Strike Won't Stop Shoppers, Even Union Sympathizers May Stick with Familiar Grocers*, DENVER POST, Oct. 6, 2009, at B10.

<sup>255</sup> See Coy et al., *supra* note 12.

Emergency Influenza Containment Act of 2009, work toward providing the forms of paid leave that American workers need in these desperate times as opposed to reducing the work week. And, unions usually obtain these benefits for their members without legislation.

If a furlough requires shorter hours of work and less pay, employers and employees should be able to determine the right balance between work and family. The stigma and the erroneous assumptions about wanting to work less that may accompany efforts to reduce the number of hours in a work week will be replaced by the health and family benefits that arise when American workers have the flexibility to pursue paid leave. If paid leave is either required by law or collectively bargained for, the same concerns about fairness for the overworked, unemployed, and underemployed in the United States that led to initial efforts to reduce the work week can also be addressed, while still allowing employees to pursue their desires for material wealth.

